

# Labour & Employment 2020

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek



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**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens,  
K Lesli Ligorner and Mark Zelek**  
Morgan Lewis

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.



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# China

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## LEGISLATION AND AGENCIES

### Primary and secondary legislation

#### 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);
- 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 for the 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, as amended on 1 July 2013);
- Employment Promotion Law (1 January 2008, as amended on 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, as amended on 1 January 2011);
- Occupational Disease Prevention Law (1 May 2002, as amended on 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, as amended on 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, as amended on 27 August 2009);
- Interim Rules on Salary Payment (1 January 1995);
- Trade Union Law (3 April 1992, as amended on 27 October 2001 and 27 August 2009); and
- Individual Income Tax Law (10 September 1980, as amended on 1 January 2019).

The Labour Law is the fundamental legislation governing labour and employment matters. 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 from 1 January 2008; the implementing regulations for 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 clearly expressed 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.

## Protected employee categories

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

Discrimination and sexual harassment are 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. The non-discrimination laws, which include the Law on Protection of Women's Rights and Interests, the Law on Protection of Disabled Persons, the Employment Promotion Law and the Employment Service and Employment Management Regulations, require employers to offer equal employment opportunities, terms and conditions to candidates and employees regardless of their gender, ethnicity, race, physical condition (eg, disability, infectious disease carrier), residency status 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.

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.

## Enforcement agencies

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

The primary government 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. These 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

### Legal basis

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.

## Powers of representatives

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, such as salary, working hours, annual leave, work safety, social insurance and benefits and training. A trade union also has the right to request that an employer revise improper company policies; and
- express its opinion in the event of economic lay-offs; the employer must give 30 days' prior notice to the trade union and consider the opinions of the trade union in its formal lay-off plan.

## BACKGROUND INFORMATION ON APPLICANTS

### Background checks

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 Cybersecurity 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 obtain the consent of the data subject before collecting, using or sharing any personal information. Moreover, the Cybersecurity 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.

### Medical examinations

#### 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. Once the Employment Promotion Law came into effect on 1 January 2008, it became unlawful 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.

### Drug and alcohol testing

#### 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

### Preference and discrimination

#### 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, candidates who come from rural locations and hold rural household residency, or secondees if dispatched to employers by any staffing firm, during the recruitment process.

Under the labour and employment laws of China, if an employee is laid off for reasons such as a bankruptcy reorganisation, difficulties

in production or business operations, adjustment of the enterprise's business methods or material changes in the economic conditions, this employee will have 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 specified 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 generally obliged 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 issue a work permit to an expatriate employee only when the term of his or her employment contract is consistent with the term of the work permit.



## Probationary period

### 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 3 months or a contract with a term to expire upon completion of certain work	No probation allowed
3 months or more but less than 1 year	Up to 1 month
1 year or more but less than 3 years	Up to 2 months
3 years or more or open-ended employment	Up to 6 months

Employers may impose only one probationary period throughout the term of employment, and an extension of the probationary period beyond the maximum period stipulated by the Labour Contract Law is generally not allowed by such Law.

## Classification as contractor or employee

### 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.

## Temporary agency staffing

### 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

### Visas

#### 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 part of the application process.

### Spouses

#### 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.

### General rules

#### 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?

If a foreign national does not obtain the right of permanent residence, and he or she engages in work in China, the local entity in China that intends to employ such worker is required to sponsor and apply for a work permit for the foreign national. 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 foreign worker without a proper visa and work permit may be fined 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 charged a fine ranging from 5,000 to 20,000 yuan. They may additionally be detained for a period ranging from five to 15 days or deported from China, or both, depending on the seriousness of the violation. Foreign nationals who are deported from China will not be allowed to re-enter China for up to five years of the date of deportation.

Nonetheless, the current rules (effective as of 28 July 2018) no longer require residents of Taiwan, Hong Kong or Macao to obtain work permits. Rather, this category of non-PRC passport holder may enter, work and reside in China without a work permit.

## Resident labour market test

### 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

### Working hours

#### 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 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 local 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 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, requires urgent repair; and
- other circumstances prescribed by laws and regulations.

In addition, employees are entitled to at least one rest day every week. Generally, an employee may not opt out of the above restrictions or limitations unless he or she consents to work under a government-approved alternative working hours system.

### Overtime pay

#### 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 he or she works more than eight hours on a workday or 40 hours in a working week or if he or she works on a statutory holiday. Overtime pay is calculated as follows:

- overtime on a regular working day: at least one-and-a-half 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.

### Vacation and holidays

#### 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 worked a total of at least one year but less than 10 years in aggregate: five days;
- for employees who have worked a total of at least 10 years but fewer than 20 years in aggregate: 10 days; and
- for employees who have worked a total of at least 20 years in aggregate: 15 days.

Service is measured against all employers, not just the current employer. Statutory holidays, rest days and other leave stipulated by law, such as marriage leave, bereavement leave and maternity leave, are not calculated as annual leave.

An employee is not entitled to paid annual leave for the current year under any of the following circumstances:

- where an employee is legally entitled to a summer or winter (or both) holiday that is longer than his or her annual leave;
- where an employee takes at least 20 days' personal leave, and his or her salary is not deducted according to the regulations of the employer;
- where an employee, who has worked a total of at least one year but less than 10 years in aggregate, takes sick leave for more than two months;
- where an employee, who has worked a total of at least 10 years but less than 20 years in aggregate, takes sick leave for more than three months; or
- where an employee, who has worked a total of at least 20 years in aggregate, takes sick leave for more than four months.

### Sick leave and sick pay

#### 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 years in aggregate and the time working for the current employer:

- for an employee who has worked a total of less than 10 years in aggregate, if he or she has worked for his or her current employer for:
  - less than five years: three months; or
  - more than five years: six months; and
- for an employee who has worked a total of more than 10 years in aggregate, if he or she has worked for his or her current employer for:
  - less than five years: six months;
  - more than five years but less than 10 years: nine months;

- more than 10 years but less than 15 years: 12 months;
- more than 15 years but less than 20 years: 18 months; or
- more than 20 years: 24 months.

For certain employees who suffer from certain diseases (such as cancer, mental illness or paralysis), and 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 since 1 July 2019 has been 2,200 yuan per month, so the minimum amount of sick leave pay is 1,760 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.

### Leave of absence

#### 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 Population and Family Planning Law. For example, maternity leave is extended by 30 days in Beijing and Shanghai.

### 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

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

### Bereavement leave

Bereavement leave is generally one to three days, subject to specific circumstances and approval of the employer, as the laws and regulations do not extend to multinational employers.

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 has no siblings, 15 days of 'parental care leave' per year to take care of his or her parent who is at least 60 years old and has been hospitalised for treatment of a medical condition.

## Mandatory employee benefits

### 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.

### Part-time and fixed-term employees

#### 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 probationary period may be stipulated in a part-time labour contract, and either party may terminate the employment at any time and without any notice. 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, and part-time employees must be paid no less than every 15 days.

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

### Public disclosures

#### 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

### Validity and enforceability

#### 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; however, the amount of non-compete consideration should be agreed to and documented in writing.

In Shanghai and Beijing, while there is no statutory minimum requirement, 20 per cent of an employee's average monthly salary in the 12-month period immediately preceding the termination of the labour contract is often considered as the minimum amount that should be paid. By contrast, in Jiangsu Province, the monthly non-compete compensation should be no less than one-third of an employee's average monthly salary in the 12-month period immediately preceding the termination of the labour contract. Further, in Shenzhen it should be no less than 50 per cent of an employee's average monthly salary for the 12-month period immediately preceding the termination of the employment contract. 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 and obtain the non-compete consideration for those three months.

Clauses on non-solicitation of either employees or company customers are not specifically addressed by the current employment-related laws and regulations. Therefore, 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.

### Post-employment payments

**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 12-month period immediately preceding the termination of the employment contract. There is no specific requirement on the compensation for non-solicitation covenants, given the lack of regulation around them.

## LIABILITY FOR ACTS OF EMPLOYEES

### Extent of liability

**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 may be vicariously liable for an employee's violations of that law, including commercial bribery.

## TAXATION OF EMPLOYEES

### Applicable taxes

**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 for withholding the applicable taxes and paying the same to the competent tax authorities upon

payment to its employees. In practice, an employer will file tax returns monthly on behalf of its employees, as the standard pay cycle is monthly.

## EMPLOYEE-CREATED IP

### Ownership rights

**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 is required to 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. Several Opinions on Strengthening the Protection of the Lawful Rights and Interests of Employee Inventors and Promoting the Implementation of the Intellectual Property Rights, issued jointly on 26 November 2012 by the State Intellectual Property Office, and other governmental agencies provide specific rules that enhance the economic compensation that the employer should pay the employee inventor in the absence of a written agreement regarding the reward and remuneration for such a patent.

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'.

### Trade secrets and confidential information

**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-compete 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 that 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 Anti-Unfair Competition Law also requires regulatory bodies and their employees to keep trade secrets learned through their investigations confidential.

The Law 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

### Rules and obligations

**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 from 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. Further, employers should limit the data collection to what is necessary for legitimate business purposes. In addition, the Draft Measures on Security Assessment of Outbound Transfer of Personal Information and Important Data further clarify that employees should grant their consent expressly and voluntarily. Although the Draft Measures are not yet 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. Therefore, 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.

**35** | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Yes, under the Cybersecurity Law, employers are required to obtain express consent from employees when collecting, using, processing, retaining and transferring their personal information outside of the employing entity, usually by the signing of a separate consent form.

**36** | What data privacy rights can employees exercise against employers?

Under Chinese law, employers have the right to know the basic information of the employees that is directly related to the employment contract, and employees shall faithfully provide such information. There is no law or regulation that provides detailed definition of 'information related to the employment contract'. Employees may refuse to provide information that is not relevant to the employment contract, such as religious belief.

## BUSINESS TRANSFERS

### Employee protections

**37** | Is there any legislation to protect employees in the event of a business transfer?

Yes, but indirectly, as terminations of employment are restricted to statutory grounds, and there is no automatic transfer of employment from one entity to a new entity. In the event of an asset acquisition in which the buyer wants any of the employees to transfer to its entity with the business assets, then the buyer will need to offer a new contract of employment, and the impacted employees will need to consent to the termination of employment with the current employer and the seller, and sign the new contract of employment with the buyer. Under the Implementing Regulations for the Labour Contract Law, the buyer should recognise each employee's total years of service with the seller, and no severance will be due to the employee. If the buyer does not recognise the employee's service with the seller, then the employee is entitled to statutory severance for the termination of employment with the seller.

If, as a result of the business transfer, the employer intends to lay off any of its employees, depending on whether the number of employees involved meets the statutory amount to trigger a 'mass lay-off', the employer may need to 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 lay-offs to the local labour administrative authorities. If the employer intends to terminate contracts of employment with certain employees outside of a formal statutorily prescribed lay-off, it must first negotiate with such employees; the employer is also obliged 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.

## TERMINATION OF EMPLOYMENT

### Grounds for termination

**38** | 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'; however, an employer may dismiss an employee with 30 days' prior notice or one month's salary in lieu of such notice in certain circumstances. The Labour Contract Law also provides for circumstances where an employer may dismiss an employee without prior notice.

### Notice

**39** | 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.

An employer may dismiss an employee with 30 days' prior notice or one month's salary in lieu of such notice if:

- after the completion of medical treatment for an illness or non-work related injury, the employee is unable to perform his or her original job or any other work position arranged for him or her by the employer;
- the employee is incompetent in his or her job and fails to make any improvement after training or adjustment of his or her position; or
- material changes of the objective circumstances have made the employment contract no longer executable, and the employer and

the employee cannot reach agreement on a change to the employment contract.

The Labour Contract Law provides for circumstances where an employer may dismiss an employee without prior notice.

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

The Labour Contract Law provides that an employer may dismiss an employee without prior notice if the employee:

- fails to meet the conditions set out for the probationary period;
- severely violates the employer's internal rules and policies;
- is corrupt or neglectful in performing his or her duties, causing severe damage to the employer's interests;
- fraudulently induced the employer to employ him or her through means such as fraud, deception or coercion;
- is simultaneously employed by another employer, severely affecting the performance of his or her duties, or he or she refuses to rectify the situation after receiving the employer's request; or
- is convicted of a crime.

An employer may dismiss an employee with 30 days' prior notice or one month's salary in lieu of such notice if:

- after the completion of medical treatment for an illness or non-work related injury, the employee is unable to perform his or her original job or any other work position arranged for him or her by the employer;
- the employee is incompetent in his or her job and fails to make any improvement after training or adjustment of his or her position; or
- material changes of the objective circumstances have made the employment contract no longer executable, and the employer and the employee cannot reach agreement on a change to the employment contract.

**Severance pay**

**41 | 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 labour contract owing to the employer's fault;
- the employer does not renew the employee's fixed-term labour contract;
- the employer initiates the termination discussion, and the employer and employee reach a mutual agreement to terminate the labour 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, or a mass lay-off, owing to the need to restructure the enterprise in accordance with the applicable laws and regulations;
- a fixed-term labour contract expires, and the employee has refused to renew the employment contract on the lesser terms proposed by the employer (severance pay is not due if the employer proposes to renew the labour contract on 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 district level 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's service commenced prior to 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.

**Procedure**

**42 | 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 a labour contract unilaterally, it must provide prior notice to the trade union, even if the employer is not unionised. In this case, the local or municipal union may be notified. If the employer violates any laws, regulations or the labour 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 a mass lay-off.

**Employee protections**

**43 | 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 owing to a work-related injury or disease;
- employees within the statutory period for medical treatment owing to non-work related medical conditions;
- employees who are pregnant, on maternity leave or in the 'nursing' period, which is the period from the child's birth until the child'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.

## Mass terminations and collective dismissals

### 44 | Are there special rules for mass terminations or collective dismissals?

Yes. If an employer intends to dismiss 20 or more employees, or fewer than 20 employees when this number represents 10 per cent or more of the total number of its employees, the dismissals 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 must consult with the employees by giving 30 days' advance notice of the background 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 mass lay-off plan with the labour administrative authorities. While government approval is not legally required to implement a mass lay-off, such approval is necessary in practice.

## Class and collective actions

### 45 | 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.

While multiple employees may bring the same claim and the hearings may be held concurrently, the adjudications are made 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.

## Mandatory retirement age

### 46 | 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 generally 60 for males, 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, and their engagement in this manner may be limited to one to two years. In general, foreign employees are not permitted to work in China beyond the legal retirement age.

## DISPUTE RESOLUTION

### Arbitration

#### 47 | 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. Mediation is also encouraged as a way to resolve disputes. Further, 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.

### Employee waiver of rights

#### 48 | 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 the waiver of potential statutory 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. Contractual employment claims, however, may generally be waived if they do not conflict with Chinese labour laws.

### Limitation period

#### 49 | What are the limitation periods for bringing employment claims?

Any claim for arbitration must be made within one year of 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. With respect to disputes over salary payments with current employees, the one-year limitation period starts from the date of termination of the labour contract.

## UPDATE AND TRENDS

### Key developments of the past year

#### 50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

With the covid-19 pandemic forcing businesses into shutdown mode, Chinese labour laws are evolving to regulate a new norm for work conditions and salary payment standards. More specifically, the central government and the local and provincial governments have each issued various regulations to address the novel employment issues that have arisen owing to the situation resulting from covid-19. For example, electronic signatures were not previously permitted for the execution of a labour contract, but they were permitted during the pandemic prevention and control period because many workers did not report in person to the workplace to sign and affix their signatures to such documents. New rules have also been issued regarding salary payment

requirements when employers are required to shut down or have opted to have their employees work from home.

Data protection legislation is becoming increasingly strict with respect to the collection, retention, processing and transfer of personal data, particularly if such transfer is outside China. Draft laws suggest that companies will need to conduct security and risk assessments in advance of transferring personal data out of the country, which will affect an employer's movement of personnel data between affiliates. Further, as privacy protections increase with respect to the personal data of employees, employees are becoming increasingly aware of these rules and protections and are increasingly challenging employers' use of data for undisclosed purposes, such as monitoring or investigations.

Additionally, employees are increasingly challenging compliance-based terminations with the knowledge that many employers do not want to air compliance issues in legal proceedings, which are by default open to the public and require burdensome evidential thresholds that many employers cannot meet.

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