About the guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of Chinese labor law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for China on immigration and data privacy. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as at September 2021.

IMPORTANT DISCLAIMER: The material in this guide is of the nature of general comment only. It is not offered as legal advice on any specific issue or matter and should not be taken as such. Readers should refrain from acting on the basis of any discussion contained in this guide without obtaining specific legal advice on the particular facts and circumstances at issue. While the authors have made every effort to provide accurate and up-to-date information on laws and regulations, these matters are continuously subject to change. Furthermore, the application of these laws depends on the particular facts and circumstances of each situation, and therefore readers should consult their attorney before taking any action.
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1 Overview

1.1 General overview

Generally, the People’s Republic of China’s (PRC or “China”) employment laws and regulations are considered to be pro-employee. Since 1 January 2008, when the Employment Contract Law of the PRC came into effect, employees have become much more willing to challenge employers on their employment practices. Although there have been an increasing number of national rules to regulate employment-related issues, there are still many areas of uncertainty, and provincial or municipal government or local courts may issue guiding opinions to address the unresolved issues. This guide mainly discusses the law at the national level.

1.2 General legal framework

1.2.1 Sources of law

The PRC is considered a civil law country and its legal system is predominantly based on statutory law. The current PRC legal system concerning employment was established in 1995 with the Labor Law of the PRC (“Labor Law”) and in 2008 with the Employment Contract Law (ECL) of the PRC, together with their respective supplementing legislation.

1.2.2 Collective agreements

Collective contracts are concluded between an enterprise and a labor union or other employee representatives.

Collective contracts are binding on all employees of the enterprise, whether they are union members or not. Agreeing an individual employment contract with “standards” that are lower than those set out in the applicable collective contract is prohibited. It is, however, possible to agree on an individual employment contract with terms that are more favorable to the employee than those in a collective contract.

So far, collective contracts have not been common in the private sector. However, following the All China Federation of Trade Union’s call for increased collective bargaining with Global Fortune 500 companies, some high-profile entities (such as Wal-Mart) have entered into collective contracts.

1.2.3 Court framework

The PRC court system has a hierarchical structure.

At the lowest level, basic people’s courts, which are established at the county or district level of major municipalities, are usually the courts of first instance.

Next are the intermediate people’s courts, established at the prefectural level (a prefectural city being an administrative division of the PRC, ranking below a province and above a county in its administrative structure), which hear appeals from basic people’s courts and can be the court of first instance for major suits involving foreign parties or for other important cases.

Above the intermediate people’s courts are the high people’s courts, established at the provincial level and in municipalities directly under the central government, which hear appeals from the intermediate people’s courts and appeals of significant cases.

Finally, at the top, is the Supreme People’s Court, which is the court of final appeal and which can give binding “interpretations” concerning the specific application of laws and regulations at the request of lower courts.
1.2.4 Litigation considerations

In the PRC, for labor disputes, before both parties resort to litigation, arbitration is a mandatory prelitigation procedure. A dispute must first be heard by a Labor Arbitration Tribunal of the relevant local Labor Dispute Arbitration Commission before it can proceed — in the form similar to an appeal — to a people’s court. With narrow exceptions, neither party can apply to a people’s court for labor dispute resolution without first completing the arbitration process.

Generally, the time limit for initiating an employment dispute arbitration is one year. Following the approval of the Civil Code, which took effect on 1 January 2021, although the statute of limitations for employment disputes will remain at one year, certain types of disputes employers may face (such as discrimination lawsuits, trade secret disputes, etc.) may be considered civil disputes and are impacted by the new statute of limitations of three years. Time starts to run on the date when the party knew, or should have known, of the infringement of their rights, and may be extended beyond one year if there is any force majeure or similar event that prevents the filing of an arbitration claim. There are narrow exceptions to the application of the one-year limitation period, for example, a current employee may bring a claim in relation to a salary dispute if they are still employed when the claim is brought. Parties dissatisfied with an arbitration award may file a lawsuit in an applicable people’s court within 15 days from the date when the written arbitration award was received.

Once the arbitration panel or court accepts a labor dispute case, satisfying the burden of proof becomes a critical procedural issue. In China, the burden of proof often lies with the employer. However, when a labor dispute arises, if the employer has any evidence related to the dispute in its possession or under its control, the employer may be required to present such evidence, if the employee shows, or it is commonly understood, that such records are possessed by the employer (such as payroll records, employee attendance time cards, etc.). If the employer does not provide such evidence, the court may draw unfavorable conclusions. On the other hand, employees have a much lighter burden of proof in a labor dispute. For example, according to a 2021 Supreme People’s Court’s labor dispute interpretation, if an employee claims for overtime pay, the employee should prove the existence of overtime work. However, if the employee proves that evidence about the existence and/or the amount of the overtime work is in the employer’s possession, and if the employer refuses to provide this information, the employer will bear any unfavorable consequences.

1.3 Types of working relationship

Individuals who provide services to entities may fall into one of the following main groups: (1) employees; (2) dispatched workers; (3) outsourcing service workers; and (4) independent contractors. The status of an individual is important because it determines whether they can enjoy the full protection of PRC employment laws, such as narrow termination grounds and entitlement to a severance payment or mandatory social insurance contributions. The table below provides more information on these groups.

| Types of working relationship | Employees include full-time employees and part-time employees. They are directly employed by the company. Part-time employees do not enjoy the same protections as full-time employees, because their employment can be terminated at will. |

---
<table>
<thead>
<tr>
<th>Types of working relationship</th>
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</table>
| **Dispatched workers**       | Labor dispatch is the most regulated hiring option in China.  
Dispatched workers are generally employed by a staffing agency and seconded to work for the host company under a labor dispatch arrangement. They are managed by the host company.  
A labor dispatch arrangement involves two contracts. First, the employee and the staffing agency sign an employment contract. Second, the staffing agency and the host company sign a labor dispatch agreement, under which the employee is seconded to the host company. Under the labor dispatch agreement, the host company has the right to directly manage the dispatched employee.  
Labor dispatch arrangements face a number of restrictions. For example, labor dispatch may only be used for temporary, auxiliary or substitute job positions. Furthermore, the host company may hire no more than 10% of its workforce through a labor dispatch arrangement. If the host company uses the labor dispatch arrangement to hire outside the three categories, or exceeds the 10% cap, the host company may be fined up to RMB 10,000 for each dispatched employee improperly hired under a labor dispatch arrangement. |
| **Outsourcing service workers** | Although not specifically addressed in China’s laws and regulations, outsourcing arrangements are also used for flexible hiring purposes.  
Outsourcing service workers are generally assigned to provide services to the host company through an outsourcing service agreement, and are managed by the outsourcing company instead of the host company. The outsourcing company only provides “services” and not “people.”  
Like the labor dispatch arrangement, the outsourcing arrangement involves two contracts. First, the employee and the outsourcing service company sign an employment contract. Second, the outsourcing service company and the host company sign an outsourcing service agreement, under which the service company provides services to the client. Unlike the labor dispatch arrangement, the employee is directly managed by the outsourcing service company in the outsourcing arrangement. In addition, the outsourcing service company is providing services instead of people.  
One risk with this arrangement is that if the outsourcing arrangement is in reality a labor dispatch arrangement disguised as an outsourcing arrangement, e.g., if the employee has sufficient evidence to prove that the host company, instead of the outsourcing company, managed the employee, the company may be subject to the same restrictions and fines applicable to a labor dispatch arrangement. In addition, if the outsourcing service company failed to duly sign an employment contract with the employee and/or to duly make statutory social insurance contributions for the employee, but was managed by the host company, the employee may argue that he/she has a de facto employment with the host company. |
### Types of working relationship

<table>
<thead>
<tr>
<th><strong>Independent contractors</strong></th>
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</thead>
<tbody>
<tr>
<td>Although China’s laws and regulations have few rules addressing whether or how someone can qualify as an independent contractor, independent contractor arrangements are also used for flexible hiring purposes.</td>
</tr>
<tr>
<td>Independent contractors are generally individuals who work for a company by directly signing a service contract. They do not have the same level of rights and protection as employees and dispatched workers, and the contract would just be treated as a normal civil contract.</td>
</tr>
<tr>
<td>In the independent contractor arrangement, the parties intend to avoid establishing an employment relationship by signing a civil contract (instead of an employment contract) and by naming the individual as an independent contractor of the intended services, though these two steps by themselves cannot eliminate the risk that the individual could later claim a de facto employment with the host company. Consideration would also need to be given to how the relationship is actually managed in practice.</td>
</tr>
</tbody>
</table>

#### 1.4 On the horizon

As employees in the PRC are becoming more willing to assert their rights (often collectively), employers are facing increasing pressure to manage their workforce.

China’s Civil Code came into force on 1 January 2021. The promulgation of the Civil Code means that for the first time, there is a relatively clear legal definition of sexual harassment at the national level, and it reiterates employers’ obligations to prevent and prohibit sexual harassment in the workplace. The Civil Code has also introduced important obligations in the field of data privacy, in particular on the handling of personal information. Interestingly, the Civil Code also allows an employer to claim an indemnity from any employee who causes damage to others in the performance of the employee’s work due to the employee’s intentional misconduct or gross negligence, after the employer has assumed tort liability for the act/omission. This suggests that the employer’s right to claim an indemnity from the employee does not presuppose any contractual agreement to that effect between them.

In addition, the newly issued Personal Information Protection Law (PIPL) will take effect on 1 November 2021. The passage of the PIPL signifies that China is stepping into a more robust and comprehensive personal information protection regime by establishing a unified, generally applicable piece of legislation, similar to the General Data Protection Regulation in the EU. Among other things, the PIPL imposes heightened requirements in terms of details to be disclosed to individuals for processing of sensitive personal information and cross-border provision of personal information, and requires separate consent from individuals in order to do so. Although it remains to be seen how strict the PIPL will apply to employee information, companies are advised to take action as soon as practically feasible to verify whether their current policies and practices are compliant with the PIPL, as contravening the PIPL may result in serious administrative fines, civil liability and criminal liability.

#### 2 Hiring employees

##### 2.1 Key hiring considerations

The concept of “at will” employment is generally not recognized in the PRC with limited exceptions, such as part-time employees who can be terminated at will.
2.2 Avoiding the pitfalls

There are many issues that an employer must consider when hiring employees, among which the most basic issue is signing a written employment contract. The consequence of not signing a written employment contract with the employee is that the employee can claim double wages starting from the second month of employment until the first anniversary of employment, if no contract is signed during the period. If the employee works at the company for more than one year without a written contract, they are deemed to have an open-term contract.

2.3 Procedural steps and key documents in recruitment

2.3.1 Identifying the vacancy

When there is a vacancy, the employer should consider whether the position should be performed by a full-time or part-time employee, or, alternatively, by a labor dispatch worker. In addition, the employer should consider whether the employment should be for an indefinite or a fixed term (for directly hired employees).

2.3.2 Selecting recruitment channels

The main recruitment channels in China include headhunters and other intermediaries; “labor markets” and “talent markets”; mass media advertising (print and broadcast); on-campus interviews; business partners; and recruitment websites.

When recruiting employees, companies must comply with general nondiscrimination principles established under the Labor Law and other relevant legislation — see 14 below.

In addition, companies are specifically prohibited from undertaking any of the following activities when recruiting new staff:

- providing false information regarding recruitment
- hiring persons without legal documents
- charging job seekers hiring fees
- obtaining guarantees from new employees
- retaining identity cards of new employees
- seeking illegal profits or conducting other illegal activities in the name of recruitment

On 18 February 2019, the Ministry of Human Resources and Social Security, along with eight other government authorities, jointly issued the Circular on Further Regulating Recruitment Practices to Promote Female Employment (“Circular”), which stipulates that in recruitment planning, job advertisements and job interviews, employers and HR service agencies may not:

- impose restrictions on a candidate’s gender or prioritize candidates based on gender
- refuse to hire women based on their gender
- ask questions about a female candidate’s marital and parental status
- include a pregnancy test as part of the onboarding health examination
- impose childbirth restrictions as a condition of employment

Further, according to the Circular, employers that publish recruitment information with gender discriminatory content may be fined an amount ranging from CNY 10,000 to CNY 50,000
(approximately USD 1,500 to USD 7,500) if the employer refuses to rectify the violation. The fine will also be recorded on the employer’s credit record.

2.3.3 Background checks

See 3.1 below.

2.3.4 Approval and recordal

No government approval is necessary for recruitment of staff in China. However, companies are theoretically required to report the recruitment of new employees by registering them with the local labor bureau within 30 days after recruitment, and to deregister an ex-employee within 15 days after the termination of their employment. In practice, these registration and reporting requirements have not been uniformly enforced. For example, Shanghai operates an online recruitment registration system. After concluding an employment agreement with an employee, the employer must register the employee and the employment agreement through the online system. Only by completing this registration procedure can the employer make mandatory contributions to the employee’s social insurance account. In contrast, no such recordal system exists in Beijing.

2.3.5 Foreign employees in China

The current work permit system classifies foreign employees into three categories (A for high-talent foreign employees, B for professional employees and C for normal employees), which are administered differently. Starting on 28 February 2018, the individual concerned must submit a work permit extension at least 30 days before the expiry date; otherwise, the individual must complete the work permit process anew. This 30-day requirement has been temporarily lifted due to COVID-19.

China no longer requires Hong Kong, Macao and Taiwan residents (“HMT residents,” i.e., Hong Kong, Macao and Taiwan passport holders with relevant mainland travel permits) to hold an employment permit to work in mainland China. Moreover, HMT residents are now eligible to receive mainland residence permits. These changes are part of the government’s attempt to facilitate the work, study and stay of HMT residents in mainland China and to protect their rights and benefits.

On 1 September 2018, China implemented new measures to allow HMT residents to apply for mainland residence permits. HMT residents who reside in mainland China for more than six months may apply for mainland residence permits if they meet any of the following criteria:

- have a legitimate and stable job in mainland China
- hold a legitimate and stable residence in mainland China
- continuously attend a school in mainland China

With the mainland residence permits, HMT residents can enjoy the same rights, basic public services and facilities as mainland Chinese residents in certain aspects, including participating in local social insurance schemes, accessing the housing provident fund and benefitting from other services according to the local law where they reside.
3 Carrying out prehire checks

3.1 Background checks

Preemployment screening

Preemployment screening can be useful for employers but, in practice, the methods for carrying out screening may be limited. Usually, preemployment screening typically covers at least some of the following areas:

- background check (including criminal background)
- credit history
- verification of employment history
- confirmation of employment references
- verification of credentials (diplomas, degrees, certification, etc.)

Other background checks

Chinese laws and regulations do not specifically address how, and to what extent, employers in China may conduct background checks on candidates or existing employees.

However, employers can still try to carry out such checks. In some localities, an employer may apply to the local police station in the candidate’s or employee’s place of residence for information on whether the candidate or employee is under police investigation or has a criminal record.

Depending on the manner in which a background check is conducted and how the information obtained will be used, employee privacy issues may be relevant.

As there are no regulations specifying any penalty for carrying out background checks, the risks to an employer that carries out background checks (without the applicable individual’s consent) are likely to be insignificant. The candidate or employee could potentially claim that, by carrying out such a check, the employer has violated their privacy and seek compensation. Such claims (especially compensatory damages) are usually difficult to establish in the PRC, and this type of claim is generally rare. Nevertheless, China is strengthening the protection of personal data by issuing the Civil Code, the Personal Information Protection Law, and other legislation. To avoid unnecessary claims, it is advisable for an employer to obtain the consent of the candidate or employee before conducting background checks. In addition, without obtaining the consent of the candidate or employee, it may also be practically difficult for the employer or its service agency to conduct background checks as the local police and/or the relevant parties who have the information of the candidate or employee may refuse to disclose the information due to their concern over personal data protection.

Credit checks

Until late 2012, when the Chinese government issued national regulations regarding credit checks (“Credit Regulations”), China did not have any credit check regulations at the national level. Before the national Credit Regulations were issued, there were only local regulations in some provinces and cities permitting private parties such as employers, upon the authorization of a candidate or employee, to obtain credit and certain background information from credit information institutions. Depending on the locality, the information that may be obtained may include personal particulars, information on an individual’s commercial credit records with various banks, public records concerning tax payments and social insurance participation, as well as records concerning civil, criminal or administrative actions that may affect an individual’s credit standing.
Under the Credit Regulations, credit information institutions may only be established upon approval from the government authorities and the People’s Bank of China. Generally, these institutions may not collect personal information unless the data subject has given consent. In addition, the institutions are prohibited from collecting personal information relating to religious beliefs, genes, fingerprints, blood type, illness and illness history. Information relating to income, deposits, securities, commercial insurance, real property and tax payments may not be collected unless the institutions explicitly inform the data subject of the potential adverse consequences for the provision of such information and obtain a written consent from the data subject.

Depending on the manner in which the credit check is conducted and how the resulting information will be used, there may be issues regarding individual privacy. In light of this, if the employer wishes to check with credit information institutions for certain personal information of an individual, it should obtain the individual’s written consent for the collection and use of the personal information. Credit checks carried out within the scope permitted by the Credit Regulations and the applicable local regulations should not subject an employer to risk. The employer should not use the personal information for purposes beyond the agreed-upon scope and, without the consent from the individual, should not provide the individual’s personal information to a third party.

Violation of the restrictions under the Credit Regulations may result in administrative penalties. Furthermore, if a candidate’s or an employee’s personal privacy is violated, an employer could face potential liabilities if the individual brings a claim.

3.2 Reference checks

There are no specific rules or regulations governing employment history reference checks. On occasion, an employer may wish to verify credentials such as diplomas, degrees or professional certifications. Because personal privacy legislation is not yet fully developed in the PRC, institutions are generally free to provide verification on an individual’s degree, credential and awards, etc. In particular, employers can use government-run websites to verify the authenticity of a candidate’s or an employee’s higher education history.

3.3 Medical checks

In recent years, it has become increasingly common in the PRC for employers to request employees to take physical examinations, including preemployment and periodic on-the-job examinations. However, drug screening and alcohol testing are still rare.

There is limited guidance under Chinese law regarding the legality of these tests. It is legal to require, as a condition of employment, that an employee possesses certain qualifications as long as the requirements do not discriminate based on, among other things, the status as a carrier of an infectious disease (except for certain industries, such as the food industry). In particular, candidates or employees cannot be made to undergo a check for Hepatitis B as part of the medical examination.

Furthermore, it is legal to establish certain health conditions for recruitment. Failure to meet these conditions may give the employer a right to terminate an employment relationship for failure to pass the probationary period, provided that the employment contract clearly lists the condition for recruitment, subject to the constraint of the law.

4 Immigration

Please refer to our Handbook, The Global Employer: Focus on Global Immigration and Mobility, which is accessible here, for information about the PRC immigration system.
5 The employment contract

5.1 Form of the employment contract

Generally, an employer must conclude a written employment contract with each employee, except for a part-time employee (with whom an oral contract can be entered into).

5.2 Types of employment contract

There are mainly three types of employment contract in China: (1) an open-term employment contract; (2) a fixed-term employment contract; or (3) a project-based employment contract. The table below provides further information on these types of employment contract.

<table>
<thead>
<tr>
<th>Types of employment contract</th>
<th>Details</th>
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<tbody>
<tr>
<td>Open-term employment contract</td>
<td>An open-term employment contract is an employment contract that does not have a fixed end date. An open-term contract would not naturally expire until the employee reaches their statutory retirement age under PRC law. Because it is generally difficult for an employer to terminate an employment contract in the middle of its term, an open-term contract will result in less flexibility for the employer to manage its workforce. An open-term contract is mandated by the law in certain circumstances:</td>
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<tr>
<td></td>
<td>• An open-term employment contract is deemed to exist under the law if the employer fails to conclude a written contract with the employee after one year of employment.</td>
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<tr>
<td></td>
<td>• An open-term contract should be signed in the following circumstances unless the employee requests a fixed-term contract:</td>
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<tr>
<td></td>
<td>o where the employee has worked for the employer consecutively for at least 10 years</td>
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<tr>
<td></td>
<td>o where an employment relationship is being renewed following an employee’s completion of two consecutive fixed-term contracts after 1 January 2008</td>
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</tbody>
</table>

The law is not very clear, and currently there is no consensus as to whether an employer is obliged to sign an open-term contract at the expiration of the second fixed-term contract, or whether the employer can choose not to renew at all at that point. The majority opinion, based on the language of the law, is that an employee can unilaterally demand the renewal of the employment contract on an open-term basis at the end of the second fixed-term, and the employer cannot refuse the renewal on an open-term basis at that point. The other viewpoint is that at the end of the second fixed term, both parties would need to agree to renew the employment contract, and if a renewal is agreed upon, the contract would be renewed on an open-term basis. In other words, an employer can refuse to renew the contract and the contract expires at that point.

There are also split court opinions over whether an employee should be entitled to an open-term contract if the employee’s employment contract is
### Types of employment contract

<table>
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<tr>
<th>Description</th>
<th>Details</th>
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<tbody>
<tr>
<td>Originally supposed to expire before the employee reaches 10 years of service and is extended to be over 10 years due to statutory grounds such as sick leave, work injury, pregnancy, maternity leave, or nursing period, etc. Guiding court opinions issued by the High People’s Courts in Jiangsu and Zhejiang Provinces state that an employee is entitled to an open-term contract under this scenario, while courts in Shanghai and some courts in Beijing will let the contract expire when the statutory circumstances disappear, and a renewal of an open-term contract is not required.</td>
<td></td>
</tr>
<tr>
<td>Fixed-term employment contract</td>
<td>A fixed-term employment contract is an employment contract with an ending date agreed upon by the employer and the employee. The ECL limits the use of fixed-term contracts to two consecutive terms, after which, an open-term contract probably should be entered into — see discussions above. Fixed-term contracts are generally preferred by employers to open-term contracts, because it is very difficult for an employer in China to unilaterally terminate an employment contract during a contract term, and a fixed-term contract at least allows the employer to let the employment contract expire without having to justify one of the statutory termination grounds. In addition, under the ECL, severance is payable to the employee if the employer lets the employment contract expire without a renewal offer. However, this severance requirement in the case of contract nonrenewal was first introduced under the ECL on 1 January 2008. Therefore, the severance calculation for a nonrenewal only needs to account for the employee's service years with the employer after 1 January 2008.</td>
</tr>
<tr>
<td>Project-based employment contract</td>
<td>Project-based contracts are contracts that end upon the completion of a certain defined project (such as a construction project). Since projects might be difficult to define and their time line is difficult to measure in reality, project-based contracts are not common.</td>
</tr>
</tbody>
</table>

### 5.3 Language requirements

An employment contract may be in a foreign language. However, in the event of a conflict with a Chinese version, the Chinese version will prevail.

### 6 Working terms and conditions

#### 6.1 Trial periods

The rule concerning probationary period duration under the ECL is as follows:

<table>
<thead>
<tr>
<th>Contract term</th>
<th>Maximum probationary period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three months to less than one year</td>
<td>One month</td>
</tr>
<tr>
<td>One year to less than three years</td>
<td>Two months</td>
</tr>
<tr>
<td>Three years or more</td>
<td>Six months</td>
</tr>
</tbody>
</table>
The ECL makes it explicit that an employer may stipulate only one probationary period with any single employee.

If an employment contract stipulates a probationary period in excess of the legal limits, the labor bureau may order rectification. If the excessive probationary period was already performed at a reduced pay level, the employer can be required to pay compensation to the employee at the employee's wage level following the completion of probation.

6.2 Working time

In China, employees are classified to work under different working hours systems, i.e., the Standard Working Hours System (SWH), the Flexible Working Hours System (FWH) and the Comprehensive Working Hours System (CWH).

Employees in China work under the SWH by default. Under the SWH, the typical work schedule is eight hours per day, five days per week and therefore a total of 40 hours per week. The two rest days under this typical work schedule may be, but do not have to be, weekends (i.e., Saturdays and Sundays). The law simply requires that SWH employees be provided at least one rest day per week (although in practice, most companies provide two rest days per week), and there is no legal requirement for when those rest days must be; while it is common to designate the weekend to be the weekly rest days, there is no legal requirement to do so, so the company can designate some other day during the week to be a rest day.

In certain industries (such as those that have seasonal ups and downs in business activity) or with respect to certain types of employees (such as very high-level managers) it may typically be inappropriate to require the application of ordinary overtime rules (see 6.5) under the SWH. PRC legislation permits employers to apply for an exemption from normal overtime rules under one of two alternative working hours systems: the CWH and FWH. Under the CWH and FWH, employees are subject to two additional sets of working hours requirements that allows them to work beyond the working hours limits under the SWH. However, the CWH and FWH can only be used for certain job positions, and approval from the local labor bureau is usually required (local practices may vary).

For a part-time employee, they are generally allowed to work for no more than four hours per day on average and their total working hours should not exceed 24 hours per week.

Piece-rate employees are generally paid per “piece” of work they complete, for example, per shoe made or shirt sewn. Enterprises are normally required to set reasonable work quotas and piece-rate remuneration standards for piece-rate employees in accordance with the general principle that working hours should not exceed eight hours per day or, on average, 40 hours in a week.

6.3 Wage and salary

Under PRC law, employee wages must be paid in statutory currency, directly to the employee, and on a regular basis. Employers must pay wages to full-time employees at least once a month. If a shorter payroll cycle is implemented — for example, weekly, daily or hourly — the employer is required to pay wages following the cycle. Furthermore, if a day for paying wages falls on a holiday or on a non-working day, the wages are to be paid on a working day in advance. Employers are only permitted to delay the payment of wages due to a force majeure event or operational and cash flow difficulties that result in a temporary delay of payment, which has been approved by the local labor union. The maximum period of delay is determined locally by the provincial level of the labor bureau.

The settlement and payment of basic wages to part-time employees may be made on an hourly, daily or weekly basis, but the settlement and payment cycle may not exceed 15 days. The hourly basic wage of a part-time employee may not fall below the minimum hourly wage rate prescribed by the People’s Government of the place in which the employee is located.
Basic wage(s) and total wage(s)

“Basic wage(s)” (jiben gongzi) and “total wage(s)” (gongzi zong’e) are foundational concepts under PRC legislation. For example, an employment contract must at least state the basic wage that an employee will be paid by their employer, although the employment contract may also (and commonly does) provide for other remuneration, such as performance bonuses. Total wages, on the other hand, is the basis for calculating severance where a severance payment is required upon the termination of an employment contract.

The legal meaning of “basic wage(s)” matches its colloquial meaning: the basic remuneration paid to an employee. Examples of basic wages include a basic salary (exclusive of bonuses and other similar payments), an hourly or other time-based wage (jishi gongzi), or a wage paid for each piece of completed work (“piece-based” wages (jijian gongzi), such as a payment for each shirt sewn or shoe made). Basic wages paid to an employee may not be lower than the local minimum wage.

With several exceptions, the “total wages” of an employee generally means all types of compensation received by the employee from their employer. Therefore, total wages include an employee's basic wages and may also include items of remuneration such as bonuses, allowances, overtime wages and “wages paid under special circumstances”. “Wages paid under special circumstances” is defined to include, among other things, wages paid during the several types of statutory leave.

Minimum wage system

The PRC maintains a minimum wage system. The minimum wage is defined as the lowest wage an employer should pay when an employee provides normal labor within the limits of statutory working hours, or working hours set out in their employment contract.

Generally, there are two standards of minimum wage: monthly and hourly. Monthly minimum wages apply to full-time employees; hourly minimum wages apply to employees who do not work full-time.

Minimum wages vary by locality. In general, the standard for minimum wages is adjusted locally every year or every other year.

Special payments

PRC law protects employees from loss of wages during certain periods of absence from work, including absences during statutory leave such as annual, maternity and sick leave.

PRC legislation provides for special rules for the payment of employees in unusual business circumstances such as during work stoppages and overtime work, and for employees who work part-time.

If operations are suspended during a payment period and the work stoppage is not caused by the employee, the employer must still pay wages according to the employment contract. If the suspension lasts longer than one payment period and the employee provides “normal labor” (zhengchang laodong) during this time, the remuneration must not be less than the local minimum wage standard. “Normal labor” refers to the labor undertaken by an employee, according to the contract concluded in accordance with the law, within the statutory working hours or the working hours stipulated in the contract. If the employee has not provided normal labor during this time (for example, has worked shortened hours), the matter should be handled according to relevant rules, which currently vary by locality.

In situations where an employer is registered in one location but runs its operations and hires employees to work in another, the employer should follow the regulations concerning wage payment and minimum wage standards in the locality where the employment contract is performed, unless the standards in the locality where the employer is registered are higher than the ones in the locality.
where the employment contract is performed, and the employment contract explicitly provides that the standards in the locality where the employer is registered should apply.

### 6.4 Making deductions

Employers are prohibited from deducting or withholding an employee’s wages without proper reasons. Under national legislation, permissible deductions include the following:

- deductions clearly provided for in relevant laws and regulations
- nonpayment of wages where an employee is on unpaid leave
- withholdings from wages for the payment of social insurance and housing premiums payable by the employee, for alimony payable by the employee according to a court ruling, and other expenses provided for in relevant laws and regulations

An employer may also make a deduction from an employee’s wages as compensation for any economic loss suffered by the employer, but only if all of the following conditions are met:

- The employee personally caused the employer the economic loss.
- The deduction is made in accordance with the employee’s employment contract.
- The monthly deduction does not exceed 20% of the employee’s monthly wages.
- The employee’s wages after the deduction are not lower than the local government-set minimum wage.

### 6.5 Overtime

Under the SWH, an employee who works over eight hours in a day or 40 hours per week is entitled to receive compensation for the extra time in accordance with the rates set below. Overtime generally should not exceed one hour per day, or three hours per day under special circumstances, and no more than 36 hours total per month.

An employer may apply to the local government labor authority to implement an alternative working hours system (CWH or FWH) under which overtime pay can normally (but not always) be avoided. The statutory overtime rates are set as follows:

<table>
<thead>
<tr>
<th>Extended working hours</th>
<th>Minimum overtime pay (percentage of regular wages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>On a “working day”</td>
<td>150%</td>
</tr>
<tr>
<td>On a rest day (if no compensation leave can be arranged)</td>
<td>200%</td>
</tr>
<tr>
<td>On a statutory holiday</td>
<td>300%</td>
</tr>
</tbody>
</table>

### 6.6 Bonus and commission

It is common practice for the total wages paid by an employer to an employee to include several other types of remuneration in addition to basic wages. Such remuneration may include cash benefits such as bonuses, allowances (e.g., travel, holiday, living, low/high temperature conditions, medicine, traffic, night work, labor protection, etc.), commissions, cars and living expenses.
Generally, there are two types of bonus: those paid at the end of the year, and discretionary bonuses that are paid based on job performance or meeting a specific company goal.

Year-end bonuses are not required under PRC law unless an employer agrees by contract that it will provide the employees with a nondiscretionary bonus at the end of the year. A discretionary bonus may also be provided for by contract, but would be payable at the employer’s discretion in accordance with the specific terms of the relevant contract.

Employers are required to pay statutory allowances to employees in some cases. For example, according to a national notice issued in 2012, employers are required to pay a high temperature subsidy to employees who work outdoors when the temperature is 35°C or above, or otherwise in a workplace when the indoor temperature is 33°C or above. With respect to the subsidy amount, the High Temperature Regulations refer to local rules that are promulgated by the provincial labor authorities from time to time.

It is also common practice for employers to contractually agree with employees to pay allowances to cover costs such as housing or other living expenses of employees. Particularly in the case of high-level employees, such benefits are often very generous and make up a major part of an employee’s total wages.

6.7 Benefits in kind

Some employees, particularly senior employees, may receive benefits other than their basic wage, such as company cars, commercial medical and disability insurance and life insurance, but such benefits are not mandatory. The benefits may also be subject to individual income tax.

6.8 Equity incentive plans

The Measures for the Administration of Equity Incentives of Listed Companies ("Measures") that came into effect in August 2016 were amended with effect from September 2018. The Measures regulate the implementation of equity-based incentive and compensation plans of Chinese-listed companies. Foreign companies in China, despite the absence of a comprehensive regulatory framework, have managed to implement such plans for their employees in the country, from senior management to line workers (with some companies awarding shares to each and every employee of their Chinese subsidiaries).

Moreover, starting from a baseline where a little over a decade ago there were no securities regulations, exchange control or tax regulations governing equity-based incentive and compensation plans in China, the Chinese government has gradually implemented regulations in each of these areas:

- Tax: Tax regulations came into effect in early 1998 so that income derived from equity-based incentive and compensation plans are subject to individual income tax. In 2005, State Administration of Taxation (SAT) issued rules to grant preferential tax treatment to qualified equity incentive income and required the filing of equity-based incentive and compensation plans with the in-charge tax bureau before enjoying the incentive. In September 2016, the Ministry of Finance and State Administration of Taxation jointly issued a Notice on Improving the Relevant Income Tax Policies for Equity Incentives and Technology Investments, implementing preferential tax policies for income generated by equity incentive plans if certain criteria are met. The SAT further issued rules in 2018 and 2019 to clarify the tax treatment of equity incentive income derived by PRC tax residents and non-PRC tax residents.

- Foreign exchange control: The State Administration of Foreign Exchange (SAFE) issued Circular 7 in 2012 under which non-PRC public companies granting equity awards to PRC employees must register their equity incentive plans with the local SAFE office where it has a
subsidiary with employees eligible to participate in the equity plan. This entity will serve as the applicant entity and will be responsible for communications with SAFE and ongoing reporting obligations. Once the registration is done, quarterly reporting requirements shall apply. Circular 7 regulates the outflow and inflow of funds for the purchase and sale of shares pursuant to equity plan and requires that such funds flow exclusively through a dedicated foreign exchange account in China under the name of applicant entity and an approved offshore account.

- Securities regulation. On the securities regulatory front, the Measures govern the implementation of equity incentive plans by companies listed on the Chinese stock exchanges. The Measures make it clear that equity incentive plans should only apply to directors, senior executives, core technicians or core business personnel of a listed company, and other employees whom the company thinks have a direct impact on the company’s business performance and future development and shall be granted incentives, but excluding independent directors and supervisors. An employee of a foreign nationality who serves as a director, senior executive, core technician or core business specialist of a listed company in China may be an incentive grantee. The Measures also provide abundant regulations on the information disclosure process of equity incentive plans, indicating a stricter supervising scheme for such plans in China. Moreover, the amended Securities Law has clarified that, effective from 1 March 2020, employee share plans will not trigger securities law requirements relating to public offers.

6.9 Pensions

The Basic Pension Insurance is one of the five statutory social insurances in China. Under the Social Insurance Law, in principle all employees in China including foreign national employees are required to participate in China’s social insurance scheme, which currently covers five statutory insurances. However, in practice, the applicability may vary depending on local requirements. Pension contributions from both employers and employees are to be allocated to either the social pool fund and/or the employee personal account. The contribution into the social pool fund is transferred to a provincial pension pool to fund the basic pension.

National legislation sets minimum required contribution rates that local People’s Governments must meet in setting local contribution rates for employers and employees. The Basic Pension Decision (issued on 16 July 1997) provides that the total contribution level of the employer into the fund usually cannot be more than 20% of the total amount of wages paid, and that the contribution level of an employee may not be less than 4% of their wage. The contribution level of the employee will then increase by 1% every two years until the contribution level reaches 8% and, at the same time, the level of the employer’s contribution into the employee personal accounts will gradually decrease to about 3%.

The employee personal account is intended to transfer with an employee if they move to another place to work. If an account holder dies, the balance in the account is paid to their family.

As for commercial pension insurance, since 1 May 2018, preferential individual income tax treatment has been given to contributions to qualified private commercial pension insurance in Shanghai Municipality, Fujian Province and Suzhou Industrial Park for one year on a temporary basis. The preferential policy is still effective in these three locations as of September 2021. Employees’ contributions to qualified private commercial pension insurance within a certain limit are deductible from their taxable wage and salary amount for the current month, and they do not need to pay any taxes until they receive benefit payments from the commercial pension insurance. However, it is not currently clear whether this tax treatment under the pilot program will be expanded to other cities.

On 24 March 2019, the Ministry of Finance announced that starting on 1 May 2019, China will reduce the employer contribution to pension insurance from 20% to 16%. The official speaking on behalf of
the Ministry of Finance further indicated that China would also at some point continue with the recent reductions in employer contributions to unemployment insurance and work injury insurance, and would also provide more social insurance contribution subsidies to employers in labor-intensive industries.

6.10 Annual leave

**Annual leave entitlement**

National mandatory minimum annual leave entitlements came into force on 1 January 2008. Under the national regulations, employees are entitled to annual leave based on their “cumulative work years,” as follows:

<table>
<thead>
<tr>
<th>Cumulative work years</th>
<th>Annual leave entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least one year and less than 10 years</td>
<td>Five days</td>
</tr>
<tr>
<td>At least 10 years but less than 20 years</td>
<td>10 days</td>
</tr>
<tr>
<td>At least 20 years</td>
<td>15 days</td>
</tr>
</tbody>
</table>

This entitlement is applicable to all employees, with only limited exceptions. For example, if an employee receives a summer or winter vacation in excess of the annual leave entitlement, has taken an aggregate of 20 days of personal leave without having their wages deducted, or takes a certain amount of sick leave, the employee will not be entitled to the minimum annual leave entitlements specified above.

Employees should normally take their entire annual leave entitlement each year. If this is not possible for business reasons, the employer can arrange for the untaken leave days to be carried over to the following year. If the employer is not able to arrange leave days for the employee, then with the agreement of the employee, the employer should pay the employee 300% of their average daily wage for each day of annual leave accrued but not taken. In reality, because the employee has already been paid for the days worked and not taken as leave, this means that the employer only has to pay an additional 200% of their daily wage for each day of leave accrued but not taken.

If an employer is not compliant with annual leave rules, the labor bureau should order the employer to rectify the noncompliance within a stipulated period of time. If the employer still refuses to comply, then the employer can be ordered to pay the compensation amount specified above as well as additional compensation.

**Statutory holidays**

Annually, there are 11 days of statutory leave entitlement as public holidays in China. Specific dates for these holidays should generally follow the official notice issued by the State Council on an annual basis, which is usually issued to the public at the end of the previous year. Under the official notice, weekend and working days are often switched in order to provide workers with a longer consecutive period of time off from work. Although the notice is not compulsory for private companies (other than the days of official public holiday), it is common practice for employers in China to follow it as this is generally expected by employees.

Employees are entitled to full pay during statutory holidays. Generally, overtime work on statutory holidays should be paid at triple the employee’s average daily wage (see 6.5 above).
### Statutory holidays

<table>
<thead>
<tr>
<th></th>
<th>Length</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Year’s Day</td>
<td>One day</td>
</tr>
<tr>
<td>Spring Festival</td>
<td>Three days</td>
</tr>
<tr>
<td>Tomb-Sweeping Day</td>
<td>One day</td>
</tr>
<tr>
<td>Labor Day</td>
<td>One day</td>
</tr>
<tr>
<td>Dragon Boat Festival</td>
<td>One day</td>
</tr>
<tr>
<td>Mid-Autumn Festival</td>
<td>One day</td>
</tr>
<tr>
<td>National Day</td>
<td>Three days</td>
</tr>
<tr>
<td><strong>In total</strong></td>
<td><strong>11 days</strong></td>
</tr>
</tbody>
</table>

#### 6.11 Sick leave and pay

Under national rules, the amount of medical leave to which an employee is entitled varies depending on their years of service (1) in the Chinese workforce and (2) with their current employer. The national entitlements are set out below. It should be noted that certain localities have their own, different systems for calculating the length of the medical leave entitlement.

In relation to sick pay, the national rule generally requires that it is no lower than 80% of the local municipal minimum wage standard and the cap on sick pay will vary depending upon local regulations.

<table>
<thead>
<tr>
<th>Total years in the workforce</th>
<th>Total years with current employer</th>
<th>Medical leave entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fewer than 10 years</td>
<td>Fewer than five years</td>
<td>Three months (cumulatively calculated in a six-month period)</td>
</tr>
<tr>
<td></td>
<td>Five years or more</td>
<td>Six months (cumulatively calculated in a 12-month period)</td>
</tr>
<tr>
<td>10 years or more</td>
<td>Fewer than five years</td>
<td>Six months (cumulatively calculated in a 12-month period)</td>
</tr>
<tr>
<td></td>
<td>Five to 10 years</td>
<td>Nine months (cumulatively calculated in a 15-month period)</td>
</tr>
<tr>
<td></td>
<td>10 to 15 years</td>
<td>12 months (cumulatively calculated in a 18-month period)</td>
</tr>
<tr>
<td></td>
<td>15 to 20 years</td>
<td>18 months (cumulatively calculated in a 24-month period)</td>
</tr>
</tbody>
</table>
An employee’s entire medical leave entitlement does not have to be taken consecutively, meaning that an employee can use up the leave entitlement at different times in a given period (e.g., two weeks in January, one week in February, three days in March). An employer may request that an employee provide proof of illness or injury (e.g., a doctor’s note) each time that the employee takes medical leave.

An employer generally may not terminate an employee during the medical leave (there are some exceptions under the ECL) since the main function of the medical leave is to allow employees to seek the medical treatment they need without fear of being terminated while they are not at their jobs. However, an employee may be terminated if they exceed the relevant medical leave entitlement.

Employers in China have no legal obligation to provide a certain number of days of fully paid “sick leave.” However, it is common practice for employers to provide a certain number of days of fully paid sick leave, though this would be considered part of and not in addition to the statutory medical leave period described above.

### 6.12 Taxes and social security

PRC nationals and foreign nationals working in China are subject to the country’s individual income tax laws and regulations. Foreign nationals may deduct certain expenses from their income when calculating individual income tax. However, this benefit will expire on 1 January 2022, unless extended by tax authorities through new regulations. Employees’ individual income tax is mainly collected through withholding by employers. Effective 1 October 2018, the threshold for tax deductions for both local PRC nationals and foreign employees is RMB 5,000 per month or RMB 60,000 per year.

PRC nationals are required to participate in China’s social insurance and housing funds systems. Pursuant to national measures that took effect on 15 October 2011, foreign nationals are required to participate in the social insurance system. Most localities have implemented this requirement. Certain countries (such as the Netherlands, France, etc.) have signed social insurance totalization treaties, under which an expat may be exempt from participating in certain types of social insurance in China if that person is making contributions in their home country. National measures (effective 1 January 2020) further require employers in Mainland China to make social insurance contributions for Hong Kong, Macao and Taiwan residents they employ. Such residents can be exempted from participating in the PRC’s basic pension and unemployment insurance schemes if they can provide documents to prove they maintain their social insurance status in Hong Kong, Macao or Taiwan. Foreign national employees, including Hong Kong, Macao and Taiwan residents, are not currently required to participate in China’s housing fund system.

The PRC’s social insurance system consists of five social insurances: Pension insurance, Medical Insurance, Work Injury Insurance, Unemployment Insurance and Maternity Insurance. Employers and employees are required to make contributions in accordance with the rates determined by local authorities.

On 6 March 2019, the State Council issued the Opinions on Promoting the Integration of Maternity Insurance and Medical Insurance, effective on the same date. According to the opinions and
comments from the National Health Care Security Administration to clarify the opinions, maternity insurance and medical insurance will remain separate social insurances but will be paid together into one fund. The opinions directly state that the purpose of the insurance fund integration is to reduce the employer’s burden in making the contributions separately. Local governments were required to integrate the funds by the end of 2019.

7 Family rights

7.1 Time off for antenatal care

The PRC’s national regulations do not provide for antenatal care leave, but local regulations might. For instance, in Shanghai, the employer should approve the employee’s application for antenatal leave of 2.5 months if the employee meets the following conditions: (i) the employee has been pregnant for seven months (28 weeks); and (ii) the employee is certified by certain qualified hospitals to have habitual miscarriage, serious pregnancy syndrome or pregnancy complications that may affect the normal childbirth. The employee is entitled to no less than 80% of her salary during the prenatal leave.

7.2 Maternity leave and pay

The Labor Law and related national legislation entitles female employees to at least 98 days of paid maternity leave. So long as a woman is compliant with state family planning regulations, her full maternity leave entitlements include the following:

- at least 98 days of paid maternity leave, 15 days of which can be taken before the childbirth
- in the event of a difficult delivery, maternity leave is extended by an additional 15 days
- where an employee bears more than one child in a single birth, she receives extra maternity leave of 15 days for each additional child born

In the case of miscarriage, the employee can receive 15 days of maternity leave for miscarriage during the first four months of pregnancy and 42 days of maternity leave for miscarriage after four months of pregnancy.

Local regulations might provide more favorable maternity leave entitlements to female employees.

Under national regulations, an employee is entitled to continue to receive her full base pay during her statutory maternity leave, though most local regulations state that the employee is entitled to full pay. The same compensation entitlements apply to any extensions of maternity leave for special circumstances.

“Late birth leave” was cancelled in 2016. However, in some localities such as Shanghai, an extra 30 days’ leave is granted for any childbirth that is in accordance with the law (although the actual amount of the extended leave varies by locality). Furthermore, in Shanghai, upon approval of the employer, a female employee may take prenatal leave of two and a half months after seven months’ (28 weeks’) pregnancy and/or a nursing leave of six and a half months after childbirth, with pay at 80% of her normal wage.

Under the current PRC family planning law that was newly revised in August 2021, women are permitted to have three children. The general understanding is that the employee is entitled to take maternity leave and enjoy the corresponding benefits for each childbirth, though some localities may not have issued the official confirmation for the third birth as the law was just revised recently.
7.3 Paternity leave and pay

The PRC’s national regulations do not provide for paternity leave, but local regulations often do. For instance, in Shanghai, a male employee is entitled to a 10-day paternity leave. The “days” here refer to “calendar days,” with the exception that statutory public holidays are not included in the paternity leave (in other words, if the paternity leave period overlaps with a public holiday, the leave should be extended by the number of days of public holiday that overlapped with the leave period). Such a male employee is entitled to full pay during the paternity leave.

7.4 Parental leave and pay

The PRC’s national regulations do not provide for parental leave in terms of a certain amount of paid or unpaid leave, but some local regulations might. For instance, in Beijing, according to a 1980 notice issued by the Beijing labor bureau, employees may apply for leave if they received a notice from their children’s school for a parent-teacher meeting. If the employer approves, the employee may receive full pay during the leave. Employers have the discretion to approve the leave.

7.5 Adoption leave and pay

This type of leave and pay is not available in the PRC.

7.6 Other family rights

Full-time employees are entitled to a one-hour break per day during the nursing period (the one-year period after the birth of the child). In the case of a multiple birth, an additional one-hour break is available for each additional baby. Employees are entitled to full pay during this break and such breaks are considered working hours (i.e., the employee will be treated as if she had worked during that break time).

In addition, in some cities, subject to local rules, female employees might have nursing leave after the usual maternity leave. For example, in Shanghai, if the employee is certified by certain qualified hospitals to suffer illness that may seriously affect the employee and the baby’s health after the childbirth, the company should approve the employee’s application for nursing leave of 6.5 months after the maternity leave period. The employee is entitled to no less than 80% of her salary during the nursing leave.

8 Other types of leave

8.1 Marriage/bereavement leave

In China, “marriage/bereavement leave” generally refers to leave (including time spent for traveling) granted by an employer to an employee when the employee marries or when direct relatives of the employee (parents, spouse or children) pass away.

National rules regarding marriage/bereavement leave were originally written for state-owned enterprises (SOEs), but the Ministry of Human Resources’ and Social Security officials’ view is that the rules apply to private enterprises as well. Moreover, most provinces and cities have issued their own marriage and bereavement leave regulations, which are generally applicable to all enterprises. Under these rules, when an employee marries, or their direct relatives pass away, an employee is entitled to one to three days’ marriage/bereavement leave.

If the groom and bride are not working at the same location at the time they are married, or if it is necessary for the employee to travel to attend the funeral of a direct relative who lived at another location, additional travel leave may be granted according to the distance to be travelled.
The national rules also provide that during marriage/bereavement leave and travel leave, the wages of the employee should be paid as usual but the employee should bear all travel expenses.

Additional “late marriage leave” was cancelled in 2016. However, under local rules in certain cities such as Shanghai, an extra seven days of leave is granted for an employee’s marriage, in addition to the one to three days’ marriage leave mentioned above. Bereavement leave should also be granted for the death of a spouse’s parent.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to 15.5.

9.2 Payment in lieu of notice

An employer is only allowed to terminate an employee with 30 days’ advance notice or pay in lieu of notice (which, normally, is calculated based on the employee’s last month’s salary) in the following three circumstances:

- when, after a period of medical treatment for a non-work-related illness or injury, the employee can engage neither in their original work nor in other work arranged by the employer
- when the employee is incompetent and remains incompetent after training or adjustment of their position
- when there is a major change in the objective circumstances relied upon at the time of conclusion of the employment contract, which makes the contract subsequently impossible to perform and, after consultations, the employer and employee are unable to reach an agreement on amending the contract

9.3 Garden leave

The law is silent on the use of “garden leave,” but the parties should be able to stipulate a garden leave provision in the employment contract.

9.4 Intellectual property

The law relating to intellectual property rights is complex. The following summarizes the basic principles for determining the ownership/authorship of an invention or work.

For employee inventions, the default rule is that the ownership of the invention or creation lies with the employer. On the other hand, if the invention is not a service invention (i.e., created during employment), then the default rule is that the ownership of the invention lies with the employee. However, “in the case of an invention or creation completed by using the material and technological conditions of one’s unit, where the unit and the inventor or designer have concluded a contract providing the ownership of the right to apply for the patent or the ownership of the patent right, such contract provisions shall prevail.” This means that the parties can agree to an alternative patent right arrangement other than the default rule specified above.

For employee works, the copyright law states that a work created by an employee in order to accomplish a task assigned by their employer is an “occupational work.” The copyright in an occupational work vests in the employee as the author. However, the employer has the right of priority in using the work within the employer’s scope of business. In addition, for two years after the completion of the work, the employee-author cannot authorize third parties to use the work in the
same manner in which the employer uses the work without the consent of the employer. Employers are advised to conclude a copyright agreement with their employees who may author occupational works.

9.5 Confidential information

The definition of a trade secret under PRC law is in line with the international standard of the World Intellectual Property Organization (WIPO), which recognizes a piece of information as “secret information” if it:

- is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question
- has commercial value because it is secret
- has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret

Pursuant to China’s Anti-Unfair Competition Law (recently amended in April 2019) and Business Secret Regulations, the elements of a protectable trade secret are the following:

- The information is of a commercial nature, e.g., information of a technical or business nature.
- It is nonpublic.
- It has commercial value.
- The owner has adopted appropriate measures to maintain its confidentiality.

PRC courts apply the above criteria to ascertain whether a piece of information qualifies as a trade secret. One recurring issue is whether information regarding a particular company’s customers qualifies as trade secrets. The Supreme People’s Court’s Unfair Competition Interpretation makes clear that customer lists can be considered a trade secret if they contain information that is distinguishable from what is in the public domain.

One of the most useful and effective ways for employers to protect trade secrets is through the use of a confidentiality agreement. The ECL provides that employers and employees may include in employment contracts “provisions on confidentiality matters relating to maintaining the confidentiality of the trade secrets of the employer and to intellectual property.” It is therefore highly advisable for employers to require managerial, scientific and technical personnel to enter into confidentiality agreements concerning the use and transfer of industrial secrets and/or technological results for the term of their employment and a specified period thereafter. A confidentiality agreement may take the form of a provision or section of an employment contract or it may be a separate agreement entered into by the employer and employee. The Anti-Unfair Competition Law makes it clear that employees and ex-employees of the trade secret holder are subject to confidentiality obligations as recipients of trade secrets, and their new employers are prohibited from using the trade secrets they received. This clarification likely reflects the focus on prohibiting acts of unfair competition committed by employees or by ex-employees and their new employers.

9.6 Post-termination restrictions

PRC legislation specifically permits an employer and an employee to enter into a noncompete agreement that restricts the employee from engaging in competitive behavior such as establishing a competing business or going to work for a competitor after the employee’s employment with the first employer ends. The employee must have received or otherwise had access to the first employer’s trade secrets during employment.
The ECL states that noncompetition agreements should be in written form. A noncompetition restriction may be included in an employment contract, which must be in writing, or in a separate agreement. In any event, a written agreement continues to be recommended given that the conclusion of a noncompetition restriction requires employer-employee agreement on a variety of potentially controversial topics, including the following:

- stipulation that compensation for the noncompetition will be payable to the employee on a monthly basis after termination
- the amount of liquidated damages payable by an employee if they compete in violation of the restriction
- the duration of the noncompetition
- the scope of the noncompetition
- the territory within which an employee is restricted from competing

The types of employees who may be subject to noncompetition restrictions are “limited to an employer’s senior management, senior technicians and other personnel with a confidentiality obligation,” and the permissible duration of a noncompetition restriction is two years following termination of employment.

The ECL clearly provides that separate compensation must be paid following the termination of the employment relationship in order for a post-termination noncompete restriction to be enforceable. This means that the practice of some companies to simply state that the noncompetition compensation is included as part of the employee’s salary has been unacceptable since 1 January 2008. However, the ECL does not provide any fixed rule to guide employers in determining how much post-termination compensation must be paid. Therefore, it is likely that the compensation requirements under existing local regulations will continue in force.

A Supreme People’s Court interpretation provides some clarity as to the compensation standards. According to the interpretation, if no compensation amount is specified in writing, the employee can claim compensation at the rate of 30% of the employee’s average monthly wage for the 12 months prior to the termination or ending of their employment contract. Based on this, compensation at a 30% rate would normally be a safe amount to stipulate in the agreement to ensure its enforceability. In addition, the interpretation provides that if the above-calculated amount is less than the minimum wage rate at the place where the employment contract is performed, the employer should pay the local minimum wage rate.

The minimum amount of noncompete compensation has been specifically stipulated in local regulations. For example, in Beijing, if the compensation is not specified in the noncompete agreement, and the employer and the employee fail to reach any agreement during the employment or at the time of termination, the court might decide an amount within the range of 20% to 60% of the employee’s total monthly salary during their last year of employment.

In addition, the Supreme People’s Court interpretation referred to above provides that if the employer fails to pay the noncompete compensation for at least three months, the employee may terminate the noncompete agreement. Furthermore, the employer may terminate the noncompete agreement during the noncompete period but, to do so, it must provide at least three months’ noncompete compensation to the employee.

9.7 Retirement

The national retirement age for male employees is 60, and the national retirement age for female employees is 50 (55 if in managerial or technical positions). As disputes relating to retirement are
increasing in practice, it is highly recommended for employers to stipulate their own policy of retirement to better manage their workforces.

10 Managing employees

10.1 The role of personnel policies

Employee handbooks are often used by employers as management tools to communicate rules and regulations to employees. The rules in handbooks or other employer rules can be used as the basis for terminating an employment contract if the employee seriously violates labor discipline or the rules and regulations. If an employee handbook has been adopted through the employee consultation procedure under the ECL, and an employee is terminated based on the rules set out in the employee handbook, then the handbook can be admitted in evidence if the employee brings an action to challenge the termination.

Quite often, there are discrepancies between the employee handbook and individual employment contracts. One interpretation provides that courts must comply with employee requests to apply the terms of the contract when there is a conflict with the handbook. In some circumstances, however, the handbook is more favorable to the employee. Some labor arbitrators may take the view that in such cases, the employee handbook is superior to the individual employment contract.

Under the ECL, employers should supplement the terms of the employment contracts with a set of company rules for the purpose of protecting employee rights and stipulating employee duties (e.g., employee handbooks, guidelines or policies). Employee handbooks/company rules might not be legally effective if unilaterally created or changed by an employer.

Under the ECL, the following consultation procedures must be followed in order to adopt a set of company rules:

- Proposed company rules are discussed by the employee representative council (ERC) or, absent the ERC, employees at large.
- The ERC or employees at large may put forward proposals or comments regarding the proposed company rules.
- The employer consults with a labor union, if any, or other employee representatives (who can be elected by employees on an ad hoc basis or be members of the ERC) regarding the proposed company rules and additional employee proposals.
- Final company rules are communicated to employees.

Note that the consultation procedure under the ECL is a procedural requirement. Therefore, the company is under no legal obligation to make substantive changes or modifications to the company rules if the employees raise such a demand, and the law does not require the actual consent of the employees to the policies. Based on court commentaries, courts in the PRC put particular emphasis on the last step in the process, i.e., publicizing the company rules to all employees. Therefore, to ensure the enforceability of the company rules under PRC law, the company should go through the full consultation procedure for full compliance; or if the company wishes to take an aggressive approach, it should at least obtain the employee’s acknowledgment of receipt of the final company rules.

10.2 The essentials of an employee handbook

There is a very general requirement under PRC law that employers should establish and develop labor rules and regulations to ensure that the employees exercise their rights and perform their obligations. That said, Chinese laws and regulations currently do not specify what should be
stipulated in an employee handbook. It is recommended that a multinational company localize the existing global policies of its offshore parent company (e.g., global code of conduct, business ethics, corporate values, recruitment policies, exit procedures, patent awards, etc.). There are some general items that an employee handbook will usually cover, such as a leave policy, work rules, code of conduct, disciplinary actions, working hours, etc. These are necessary, as a matter of PRC law, to provide a legal basis for the company to take any HR/employment-related actions vis-à-vis its employees, such as conducting disciplinary actions against employees up to summary dismissal.

10.3 Codes of business conduct and ethics

While it is not mandatory in China, it is critical for a multinational company to have a code of business conduct and ethics in place in order to build a legal basis for the company to manage employees’ business activities and take any disciplinary actions as necessary. A practical approach to launch the policy is to localize the global code of business conduct and ethics in China.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible here, for information on data privacy and monitoring requirements in the PRC.

12 Workplace safety

12.1 Overview

Various national laws and regulations and local rules have been enacted to strengthen the PRC government’s supervision and control over occupational safety, prevent or reduce occupational accidents and ensure personal safety. Employers are obliged to comply with relevant work safety laws, regulations and rules, and to establish a “work safety responsibility system” under which the “principal responsible person” of the employer is fully in charge of and responsible for work safety. Violation of these rules by employers or governmental officials may lead to administrative sanctions, civil liability or even criminal liability.

Employers in the PRC must establish their own system for labor safety and hygiene, provide workers with safe labor and hygienic conditions and protective gear, educate workers concerning labor safety and hygiene, prevent work accidents, and reduce occupational hazards.

There are specific provisions for dealing with infectious diseases. For example, an employer must promptly notify the local health or disease prevention authority if the employer learns or thinks that an employee has an infectious disease.

Work injury insurance is part of the statutory social insurance program.

The amendments to the Law of Prevention and Control of Occupational Diseases enacted in 2017 and 2018, the Plan on Occupational Disease Prevention for Years 2016 to 2020 issued by the State Council on 4 January 2017, the Guidance on Pushing Forward Reform and Development in Work Safety announced in December 2016 and the amendments to Work Safety Law in 2021 jointly signal China’s clear intent to reduce occupational disease hazards and workplace accidents.

On 17 February 2019, the State Council issued the Regulations on Emergency Response to Production Safety Incidents, effective on 1 April 2019. The emergency response regulations impose new emergency response obligations on governments and production operation companies; the scope of the term “production operation companies” is unclear and could potentially apply to most companies. The persons-in-charge of production operation companies are now responsible for all emergency responses for production safety incidents.
According to the emergency response regulations, all production operation companies must establish an emergency response plan. The emergency response plan must comply with applicable laws, regulations and standards and be disseminated to the company’s employees. In addition, certain production operation companies must report their emergency response plans to the government.

Companies required to report are those that:

- produce, operate, store or transport combustibles, explosives or hazardous chemicals
- operate metal smelting, mining, urban transportation or building construction activities
- operate hotels, shopping malls, entertainment venues, etc.

12.2 Main obligations

**During recruitment**

During the hiring process, employers must truthfully inform employees of the following safety-related information: the content of the relevant work; the working conditions of the position; the place of work; any occupational hazards; the production safety conditions; and other matters about which the employee requests information.

Employees must in turn provide employers with truthful information relevant to the employment relationship. The information provided by either party may affect whether an employment relationship is ultimately concluded, as well as the terms of the employment contract.

**General safety and health obligations**

Employers have general occupational safety and hygiene obligations under the Labor Law, such as providing workers with safe and hygienic working conditions, establishing and perfecting a system for labor safety and hygiene, providing employees with safety gear in accordance with regulatory requirements, etc. In addition, specifically for the prevention of occupational disease, the employer should conform to national occupational health and sanitation standards; separate harmless and harmful types of work; maintain adequate equipment, tools and appliances to protect employees; organize and provide occupational health training for employees, etc.

An employer is restricted from making any agreements with employees in order to avoid or lessen the employer’s legal responsibilities toward employees who are (or may be) injured or killed in accidents that occur due to insufficient workplace safety precautions on the part of the employer.

While employers must comply with numerous specific workplace health and safety obligations, employees have a basic obligation to follow labor safety and hygiene rules and to strictly abide by operation safety procedures when carrying out their work. In order to engage in specialized operations, an employee must undergo specialized training and obtain qualifications for those operations. The government formulates vocational skills standards and implements a scheme of occupational qualification certificates for certain categories of occupation. The government also has the responsibility for examining and appraising employees’ vocational skills.

Companies must also comply with obligations such as forming a contingency plan drafting group, publicizing and distributing the contingency plan, informing nearby companies and people, and assessing the contingency plan regularly, in accordance with the amended Measures for the Administration of Contingency Plans for Work Safety Incidents (issued by the Ministry of Emergency Management on 11 July 2019).

In addition, under the amended Work Safety Law, which took effect on 1 September 2021, companies shall pay attention to the physical and psychological conditions and behavior habits of their employees, and strengthen psychological counseling and spiritual consolation for their employees.
Companies that belong to high-risk industries (e.g., coal mining) are required to purchase work safety liability insurance; other companies are encouraged (but not obliged) to do so.

12.3 Claims, compensation and remedies

Employees have a basic right to occupational safety and hygiene protections in the course of their work. Employment contracts must include provisions regarding the work safety of employees and the measures taken to prevent occupational hazards. In addition, collective contracts commonly cover labor health and safety issues. Employees who lose the capacity to work as a result of a work-related injury, who have been exposed to occupational disease hazards and still have not undergone a medical examination, or who are suspected of contracting an occupational disease and are still being diagnosed or under observation are protected against termination in certain circumstances.

Administrative sanctions, ranging from warning to suspension or cancellation of relevant licenses or permits, may be imposed on employers (or their decision-making bodies, such as the board of directors or the principal responsible persons) for violation of work safety and hygiene requirements.

If the employer and the employee have established an employment relationship under PRC law, and the employer has enrolled the employee in the work-related injury insurance system as required by law, the employee will only be entitled to claim for benefits under the work-related injury insurance scheme. In that case, most of the compensation payable to the employee should be at the cost of the work-related injury insurance system, while the employer still needs to pay a few compensation items to the employee. However, if the employer does not enroll the employee into the work-related injury insurance system as required by law, the employer is obligated to pay all work-related injury insurance benefits to the employee (including those items covered by the social insurance fund if the employee is enrolled in the work-related injury insurance).

There are several different types of crimes that may apply to a responsible person of an employer who violates relevant work safety requirements, such as the crime of a major responsibility accident (zhongda zeren shigu zui), the crime of forced risky operation in violation of regulations (qiangling weizhang maoxian zuoye zui), the crime of a major work safety accident (zhongda laodong anquan shigu zui), the crime of a dangerous item accident (weixian wupin zhaoshi zui), the crime of a major construction safety accident (gongcheng zhongda anquan shigu zui), the crime of a fire prevention responsibility accident (xiaofang zeren shigu zui), and the crime of failure to report or correctly report a safety incident (bubao huangbao anquan shigu zui).

13 Employee representation, trade unions and works councils

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in China, please contact us. See Key contacts for contact details.

14 Discrimination

14.1 Who is protected?

PRC law provides for many types of protection for employees. The following are the four basic areas of employee protection:

- Protection for special employees, such as women, children and minors. Chinese legislation stipulates protections for certain types of employees that are viewed as vulnerable to discrimination and exploitation. Pregnant women, for example, have very strong protections against termination under the ECL.
Protection against discrimination of disabled employees, infectious disease carriers and migrant workers, or based on nationality, race, sex or religion. In practice, however, most anti-discrimination laws in China are not well understood or rigorously enforced by the courts or relevant government agencies. As a result, there are few anti-discrimination enforcement actions by the local labor authorities or discrimination claims by individual employees.

Protection of employees against sexual harassment. China’s sexual harassment laws and regulations used to be gender specific, and were designed to protect women from sexual harassment by men. Male employees were technically not protected by China’s sexual harassment laws, but might have been able to rely on general civil law and tort law for protection against same-sex harassment or harassment by women. However, with the promulgation of the Civil Code, which came into force on 1 January 2021, there seems to be a trend toward anti-harassment without gender bias. Under the Civil Code, the victim has the right to request the harasser to bear civil liabilities, and legal protection is no longer limited to just women. Shenzhen’s local regulations on promotion of gender equality have also indicated such a trend. There are a number of laws and regulations at both the national (including the Civil Code) and provincial level that require companies to “prevent and prohibit” sexual harassment in the workplace. In practice, however, anti-harassment laws are not well enforced, and sexual harassment claims by employees against their managers and their employers are relatively rare. Rules of evidence that are skeptical of oral testimony essentially prevent an alleged victim of harassment from bringing a “he said/she said” type of case without the type of demonstrable evidence that may be difficult to obtain in a sexual harassment case. Low damage awards, judicial attitudes and other social pressures may also contribute to the relatively low number of such claims.

There were very limited employee privacy and data protections in the past. However, with the promulgation of the Civil Code and the Personal Information Protection Law (which will come into force on 1 November 2021), this situation has changed. [Please refer to our Global Privacy Handbook, which is accessible here, for information on data privacy and monitoring requirements in the PRC.]

14.2 Types of discrimination

See 14.1. Generally, discrimination based on sex, disability, religion, race, and ethnicity/nationality and against infectious disease carriers and migrant workers is prohibited.

14.3 Special cases

14.3.1 Protection for HBV carriers

PRC law prohibits employers from discriminating against employees or job applicants with Hepatitis B (HBV) in making employment-related decisions such as hiring and termination. Employers are not allowed to require employees or job candidates to be screened for HBV unless the employee is applying for a job, or working in a position that specifically permits such screening. In order to prevent illegal discrimination against HBV carriers, an employer cannot require job applicants to be tested for the HBV virus. In case of a violation, local labor bureaus may request an employer to rectify and may impose a fine of up to RMB 1,000, and the employer may also be liable for damages caused to the employee or job candidate.

14.3.2 Protection for HIV carriers

Under PRC law, employers may not discriminate against an individual infected with HIV or HIV carriers, and their right of employment (among other rights) is protected by law.
Unlike HBV tests, the national law does not expressly prohibit employers arranging for employees to have HIV tests, but does state that HIV counselling and testing should be conducted on a voluntary basis. Some local regulations have stronger prohibitions that expressly state that employers cannot force employees or job candidates to take HIV tests, except for those positions permitted by the government.

14.3.3 Disabled employees

The Law on Protection of the Disabled is China’s main law concerning the protection of disabled Chinese citizens not only at work but also in areas such as education, social benefits, environmental concerns and cultural life. This prohibits discrimination against disabled employees in areas including recruitment, change to permanent status, promotion, evaluation, remuneration, fringe benefits, rest and leave, social insurance, etc.

14.3.4 Migrant workers

The term “migrant workers” (nong min gong) generally refers to workers who hold rural residency (hukou) but work in urban areas. The Employment Promotion Law (EPL) entitles migrant workers to equal labor rights, and the “establishment of discriminatory limits on the employment” of migrant workers is prohibited. Many provincial and municipal governments have their own local rules on the protection of migrant workers. For example, the governments of Beijing and Shanghai have developed rules to address social insurance contribution and salary payment issues for migrant workers.

14.4 Exclusions

Occupational requirements

Discrimination against individuals who are simply carriers of infectious diseases is prohibited, with the exception that infected individuals may not engage in specific occupations where there is a higher risk of the spread of infectious diseases (e.g., child care or food service), as prohibited under relevant laws, regulations or Ministry of Health rules.

14.5 Employee claims, compensation and remedies

The effect of the prohibitions against discrimination were greatly limited in the past because for most types of discrimination, no penalties were specified in any laws or regulations, nor was any right explicitly granted to individuals to sue entities that violated these prohibitions. While cases were brought by those who suffered discrimination, the legal basis for bringing the claims was tenuous.

The EPL was designed to address this issue by giving individuals the right to bring a discrimination claim to a people’s court. However, the EPL does not have clearly defined remedies or damages for unlawful discrimination. In the absence of clear damages or stipulated remedies, plaintiffs can find it difficult to claim monetary damages since the harm suffered is of such an abstract nature; PRC judges are generally reluctant to award monetary damages unless concrete economic harm can be proven.

With the implementation of the Circular (see 2.3.2 above), employers that have a gender discrimination complaint lodged against them could face a government inspection. If the employer refuses to cooperate with the government’s interview or refuses to rectify the discriminatory behavior after the interview, the government will publicize the employer’s discriminatory conduct in the media.

There are also some procedural ambiguities with respect to whether discrimination claims should be treated as employment disputes, where the claim should usually be submitted within the time limit of one year, or as ordinary civil claims, which usually have a three-year time limit within which to bring the claim.
In addition, unlike in other jurisdictions with more sophisticated civil rights regimes, there are no clear standards for proving discrimination. For example, in many jurisdictions, a plaintiff can sustain a claim if they can prove that an employer’s employment policy is discriminatory in effect, even if it is neutral on face value. However, PRC law simply provides that certain forms of discrimination are prohibited without any further explanation, which means that a plaintiff in China will normally need to prove that an employer intentionally instituted practices that are, on face value, discriminatory.

14.6 Potential employer liability for employment discrimination

See 14.5 above.

14.7 Avoiding discrimination and harassment claims

To help avoid discrimination and harassment claims, companies can include anti-discrimination/harassment policies or procedures in their employee handbook/company rules. An important issue in this is ensuring that the reporting channel is effective to protect the employees who submit complaints.

15 Termination of employment

15.1 General overview

Full-time and part-time employees in China are treated very differently in terms of grounds for termination. A part-time employee can be terminated at any time without prior notice or statutory severance. By contrast, there are fairly strict and complicated limitations on the termination of full-time employees. There are four main methods by which a full-time employment relationship may end: (1) unilateral termination by the employer; (2) termination by mutual agreement between the employer and employee; (3) automatic ending of an employment contract; or (4) resignation by an employee.

15.2 By the employer

Unilateral termination

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<tr>
<th>Unilateral termination categories</th>
<th>Circumstances when this category applies</th>
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| Immediate termination of an individual employee with no severance payable | • When the employee is proven during the probation period not to satisfy the conditions for employment.  
• When the employee seriously breaches the employer’s rules and regulations.  
• When the employee commits serious dereliction of duty or engages in fraudulent and unlawful practices for the employee’s personal gain, causing major harm to the employer.  
• When the employee has their criminal liability pursued in accordance with the law.  
• When the employee has an employment relationship with another employer that materially affects their work for the first employer, or they refuse to rectify the matter |
Unilateral termination categories | Circumstances when this category applies
--- | ---
after the same is brought to their attention by the first employer.  
• When the employee causes the employment contract to be invalid due to use of coercion, deception, or taking advantage of the employer’s difficulties to make the employer sign the employment contract.

Termination of an individual employee upon 30 days’ notice and with severance payable  
• When after medical treatment for a non-work-related illness or injury, the employee can engage neither in their original work nor in other work arranged by the employer.  
• When the employee is incompetent and remains incompetent after training or adjustment of their position.  
• When a major change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it impossible to perform and, after consultations, the employer and employee are unable to reach an agreement for amending the employment contract.

Collective dismissals (mass layoffs)  
Workforce reductions as described are permissible when the following circumstances affect the employer:  
• serious difficulties in production and/or business operations  
• restructuring pursuant to bankruptcy law  
• the enterprise switches production, introduces a major technological innovation or revises its business method and, after amendment of employment contracts, still needs to reduce its workforce  
• a major change occurs affecting the objective economic circumstances relied upon at the time of conclusion of relevant employment contracts, rendering them impossible to perform

An employer must give prior notification to a union (if the company has a company union) before unilaterally terminating employees. This requirement applies in all cases of unilateral termination by an employer.

15.3 By the employee

Generally, an employee must provide an employer with 30 days’ written notice before they can resign from a company, though there are some exceptions (e.g., part-time employees may resign at any
time). Specifically, the ECL requires an employee in their probationary period to give three days’ prior notice of resignation.

In certain circumstances, an employee can resign with immediate effect, such as:

- when the employer fails to provide the labor protection or working conditions specified in the employment contract
- when the employer fails to pay labor compensation in full and on time
- when the employer uses violence, threats or unlawful restriction of personal freedom to compel an employee to work
- when the employer fails to pay social insurance premiums for the employee in accordance with law
- when the employer has rules and regulations that violate laws or regulations, which harm the employee’s rights and interests
- when the employer causes the employment contract to be invalid due to: (i) use of coercion, deception, or taking advantage of the employee’s difficulties to make the employee sign the employment contract; (ii) a disclaimer of the employer’s legal liability or denial of the employee’s rights; or (iii) a violation of mandatory legal provisions
- when the employee is instructed by their employer in violation of rules and regulations, or is peremptorily ordered by their employer to perform dangerous operations that threaten their personal safety
- when the employer refuses to pay an employee for overtime
- when the employer pays the employee below the local minimum wage
- other circumstances provided for under the law

15.4 Employee entitlements on termination

An employee may be entitled to statutory severance, compensation for accrued but unused annual leave, payment in lieu of notice or other contractual entitlements depending on how the employment is terminated.

15.5 Notice periods

See 15.2 and 15.3.

15.6 Terminations without notice

See 15.2 and 15.3.

15.7 Form and content of notice of termination

The notice of termination should be in written form, but there are no specific statutory requirements for the content of such notice.

15.8 Protected employees

In certain circumstances, employers are prohibited from unilaterally terminating the employment of individual employees. An employer cannot unilaterally terminate an employee on any of the grounds
requiring 30 days’ notice, including collective dismissal grounds, if any of the following circumstances apply to an employee:

- The employee suffers from an occupational disease or injury, and is confirmed to have lost or partially lost the ability to work.
- The employee is in a statutory medical treatment period for a non-work-related illness or injury.
- The employee is pregnant, or within one year after childbirth.
- The employee is engaged in operations exposing them to occupational disease hazards and has not undergone a predeparture occupational health checkup, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observation.
- The employee has worked for the employer continuously for at least 15 years and is less than five years away from their legal retirement age.
- The employee is still in their term as collective bargaining representative during collective bargaining negotiations.
- Other circumstances stipulated in legislation.

15.9 Mandatory severance

The ECL provides that the basic formula for calculating severance is one month’s “average monthly wage” for each full year of service with the employer.

The average monthly wage is calculated by adding up the “total wages” received by the employee during the 12 months prior to termination and then dividing that number by 12. The “total wages” shall include income such as a base/piece-rate salary, bonuses, allowances and subsidies. If the employee’s average wage during the last 12 months is less than the local minimum wage, the calculation shall be based on the local minimum wage. If the employee has worked for less than 12 months, the average salary shall be calculated according to the number of months actually worked.

However, if the average monthly wage of an employee exceeds 300% of the average municipal wage in the locality where the employee works, then that employee’s severance pay shall be capped at 300% of the average municipal monthly wage.

In terms of calculating the years of service, if an employee has worked for a period of less than six months, then the employee would be entitled to half a month’s wage for that period of service, but if the employee has worked for a period of between six months and one year, then that period shall be considered a full year of service for severance calculation purposes so that the employee would be entitled to a full month’s wages.

According to national measures issued in 1994, if an employee is terminated because of continued inability to work due to illness or injury, then an additional medical subsidy equivalent to six months’ wages should be paid; if the employee suffers from a serious illness or a terminal illness, then the medical subsidy amount is increased by 50% or 100%, respectively. As the 1994 national measures have now been repealed, it is not clear whether the medical subsidy payment rules are still applicable, though they are generally understood to still apply. Some localities may also have their own rules in this respect.

If an employee commenced working for the employer before 1 January 2008 (when the ECL took effect), their statutory severance for the pre-2008 portion shall be calculated in accordance with local regulations in effect at that time.
15.10 Collective redundancy situations

An employer undertaking collective dismissals must complete a three-part procedure set out below:

- Explain the reasons for the dismissals to its labor union or to all employees 30 days in advance of the dismissals.
- Consider the opinions of the labor union or the employees.
- Report its plan for workforce reduction to the local labor bureau.

There may be local variations to the procedural requirements above and, in some locations, certain requirements are difficult to comply with. For example, in Shanghai, an employer is required to submit documents evidencing the election of employee representatives when reporting a mass layoff to the competent labor bureau. In addition, the report to be submitted to the labor bureau must have the union's or employee representatives' opinion and carry the union's seal or employee representatives' signatures. In effect, this means that the employer needs the agreement of the company union or employee representatives.

15.11 Claims, compensation and remedies

In the PRC, an employment contract may only be terminated by an employer in certain limited circumstances. If an employer unilaterally terminates an employee relationship and is not able to justify the termination on one of the statutory grounds, or if the employee is protected from termination, the employer would be deemed by the courts to have committed an unlawful termination.

If an employer is held to have unlawfully terminated an employee, a labor arbitration panel or court may rule the termination to be void and reinstate the employee.

If the employee does not demand reinstatement or if reinstatement is “not possible,” then the employee should be awarded damages equal to double the amount of statutory severance to which the employee would be entitled if they had been lawfully terminated (although in many localities, the double severance penalty is capped for all years of service even though the severance for lawful termination may only be capped for years of service since 1 January 2008).

15.12 Waiving claims

Usually, contractual claims can be settled and waived very easily.

Mutual termination contracts (MTC) can include a waiver and release clause whereby the employee waives any and all present or future claims against the employer, which are generally deemed enforceable as long as there is no obvious unfairness, misunderstanding, coercion or deception used to obtain the employee's consent to the MTC.

An employee will sometimes attempt to rescind a signed MTC on the grounds of a waiver of a right unknown at the time of signing the MTC. PRC courts are generally split in their opinion as to whether an MTC can be rescinded in such circumstances.

16  Employment implications of share sales

16.1 Acquisition of shares

In an equity acquisition, the acquirer becomes the new shareholder of the company, and there is no change to the employees’ employment relationship. Under this scenario, there is no need for an employee transfer since the company that hires all employees is still the same legal entity. Only the owner of the company changes, and everything else from an employment perspective remains the same.
16.2 Information and consultation requirements

If the immediate interests of the employees will be affected by any of the management decisions taken as part of the transaction, obtaining the cooperation of the enterprise union is required. These consultation requirements are vaguely worded, with no details provided regarding the timing or procedures. More importantly, no penalties are specified in any of the relevant laws and regulations, so in practice many private enterprises have rarely, if ever, followed the consultation requirements. However, there is a theoretical possibility that any decision taken without following the necessary consultation procedures can be challenged and invalidated, although we are unaware of any case where this has actually occurred.

17 Employment implications of asset sales

17.1 Acquisition of assets

Frequently, a company will not wish to take over an entire target enterprise, but rather only a specific business division within it. Generally, not only will the company want to purchase physical assets or inherit contractual rights related to the division, but it will also want to retain the employees who are currently supporting it. This makes sense because the employees already involved in the business division would obviously be the most familiar with how it has been operating; furthermore, hiring all new employees would involve a great amount of time and cost.

17.2 Automatic transfer of employees

With the exception of merger and division transactions, there is no automatic transfer of employees from one entity to another in the PRC following a transfer of a business undertaking. Rather, if the seller and purchaser plan to transfer employees as part of the asset deal, the employment relationship with the seller must first be terminated and the employee must then sign a new employment contract with the purchaser entity. This is in contrast to the European Union, where employees automatically transfer along with the business division as part of a typical transfer of undertakings.

The termination and rehire mechanism can be advantageous from the purchaser’s point of view. Since there is no automatic transfer of employees or undertakings in an asset deal, no liability for noncompliance during the prior employment at the seller would be transferred to the purchaser along with the employees, unless the parties agree otherwise by contract. In addition, a purchaser is free to choose which employees to employ before the transfer.

17.3 Changes to terms and conditions of employment

In the PRC, when an employee signs a new employment contract with the purchaser, a completely new employment relationship is created. The purchaser is under no obligation to take on the terms and conditions that were offered by the seller entity to its employees, unless the purchaser agrees to do so by contract. In contrast to some jurisdictions, there is no legal requirement in China that a purchaser offer employees the same or, in the aggregate, similar compensation and benefits as were previously provided by the seller.

Because employees cannot be forced to sign an employment contract with any entity, however, employee consent is essential in order to complete any employee transfer. In addition, there is no collective transfer of employees in China; rather, each individual employee must agree to be employed by the purchaser. This puts an employee in a position of power if the purchaser truly wants or needs their services.

In light of this, in practice, a purchaser may need to offer employees terms and conditions that are substantially the same as or better than those the seller provided. In some cases, a sign-on bonus or
a retention bonus may be needed to attract and retain the employees. Otherwise, the employees may refuse to transfer to the purchaser.

17.4 Information and consultation requirements

See 16.2 above.

17.5 Protections against dismissal

See 15.8 above.

17.6 Other considerations

Issues for the purchaser: recognition of years of service

Depending on the circumstances behind the employee transfer, the purchaser may be legally required to recognize the employees' prior years of service with the seller. Relevant regulations stipulate that if an employee is “transferred” from one employer to another “for a reason not attributable to the employee,” the new employer should recognize the employee’s prior years of service with the previous employer. Whether this would apply in an asset transfer situation where the employee must consent to the transfer remains an area of dispute, and different courts may take different positions on this issue.

From the purchaser’s perspective, it would be advantageous if severance were paid at the time of transfer. This is because, under certain ECL regulations, if the seller pays severance at the time of the transfer, then if and when the purchaser wishes to terminate its employment relationship with the employee in the future, it will not need to include the employee’s prior years of service with the seller when calculating severance. However, the ECL regulations are not clear whether the purchaser would need to recognize the employees' years of service at the seller for other purposes, such as entitlement to statutory benefits (e.g., medical leave) or entitlement to an open-term contract, where length of service is relevant, even though severance has been paid by the seller. Local labor arbitrators and judges may have different views on this, depending on the circumstances.

Issues for the seller: transfer options

As mentioned in 17.2, the first step in any employee transfer is the termination of the employee’s employment relationship with the seller, which is a prerequisite for the employee’s employment with the purchaser. Because employee consent is required to complete the transfer, terminations are usually accomplished by convincing an employee either to resign from the seller or to sign an MTC (see 15.12) with the seller.

The advantage of an employee resignation is that no statutory severance is required. However, there are several disadvantages to this option. First, if any pressure or coercion is used to convince the employee to resign, they may later claim that the resignation is invalid and demand reinstatement or severance. Second, a letter of resignation does not have a contractually binding waiver and release clause, although employees can sign a waiver and release agreement along with submission of the resignation letter. Finally, employees who are savvy about their employment rights may refuse to submit the letter because they know that no severance needs to be paid in a resignation.

The MTC option for terminating employee relationships likewise has advantages and disadvantages. An MTC, which usually includes a waiver of claims, is a safer way to avoid an employee claim of unlawful termination. However, a disadvantage is that statutory severance must be paid if the seller suggests the mutual termination to the relevant employee, which is normally the case in an asset deal. This is true even if the purchaser will immediately employ the employee on the same or similar terms.
In order to avoid paying severance, many sellers manage to convince the purchaser as well as the employee to sign a tripartite mutual termination and transfer contract (MTTC) among the seller, the employee and the purchaser. Under an MTTC, the employee waives their right to severance, in exchange for which the purchaser agrees to recognize the employee’s prior years of service with the seller for the purpose of calculating any future severance pay entitlements. Under this arrangement, severance will not be paid by the seller to the employees at the time of the transfer. However, such potential severance obligations would be transferred to the purchaser in any future termination of the employees by the purchaser, if and where severance is payable.

17.7 Other information and consultation obligations

In an asset deal, another issue that a seller may face is how to handle an employee who does not transfer to the purchaser, either because the purchaser does not wish to hire the employee or because the employee refuses to transfer. The seller will need to decide whether it wishes to retain, and possibly find a new position for the employee within the company, or to terminate the employee.

The seller generally has only two options if it wishes to terminate the employee or the employee refuses to take an alternative position at the seller: mutual termination or unilateral termination.

Before an employer can unilaterally terminate an employee based on a major change in objective circumstances, the seller must consult with the employee about amending the employment contract so as to be able to continue the employment relationship. Sellers frequently overlook this step, but termination on this ground is unlawful unless such consultations fail to produce an agreement.

Unfortunately, there is no guidance provided at the national level regarding how long the consultations must last or what form they should take. Employers must check whether the relevant local regulations provide any guidance. For example, in Beijing an employer wishing to amend an employment contract on the ground of a major change in objective circumstances must send the affected employees a written notice of request to amend the current employment contract terms. The employee has 15 days to respond to this notice. If there is no response, they are deemed as having refused the amendment request.
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