

China Labour Law: Hiring & Firing In China

Executive summary

Knowing the labour laws of any country is essential for conducting business with or within that country. China is no exception. The labour laws are written to protect employee's rights. This is not to imply that businesses have no power over decisions regarding their employees, but rather to ensure that employees in China are treated fairly. Overall labour laws are quite comprehensive in China and not that different from those in many European countries.

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LEHMANBROWN
雷博國際會計
International Accountants



Dickson Leung, Senior Partner
dleung@lehmanbrown.com

LehmanBrown International Accountants is a member of MGI Asia with office locations in Beijing, Guangzhou, Hong Kong, Macau, Shanghai, Shenzhen and Tianjin, China. Dickson is a Senior Partner at the firm and also North Asia Circle Leader for MGI in Asia. Dickson has over 24 years China accounting and financial experience and the firm has been a member of MGI Worldwide for 10 years. For more information go to www.lehmanbrown.com

Set-up of the Contract and Employment Rules

A contract is mandatory and it should be finalised the latest by the end of the employee's first working month. If not the employer will have to pay double salary up until when a contract is put in place, and if a year passes without a contract from the employee's initial start date, the company and employee move to an open-ended labour contract thereafter with double pay.

As well as recognising the rules of the contract, the business must recognise that the People's Republic of China (PRC) labour laws do not outline specific situations that might be regarded as a breach of company policy.

Therefore it is advisable for companies to put in place a Staff Handbook (company policies and procedures manual). In the handbook it should describe policies specific to the company; hours of commitment expected, employee benefits, and other such details that should be clarified to the employees but are not stated in the contract. Employees should sign every page of the handbook to confirm that they have read through it before signing. Abnormal working arrangements should firstly be agreed with the Labour Bureau.

Contracts can be invalid if there is evidence that a contract was not agreed to voluntarily, or was procured by fraud or under duress.

As an employer the law allows contracts to be for a set period (see below). If a company decides to revise certain rules relating to the terms of employment, discussions should be held both with the employee (representatives of employee may take place of employee) and with the labour union if there is one before making the decision to revise.

Hiring as a Foreign Company

A Representative Office in China cannot directly employ a Chinese national; instead, it must recruit through a labour service organization who will hire employees for the representative office on the company's behalf.



Foreigners are employed as Representatives of a Representative Office and are limited to only four. Foreign Invested Enterprises (FIEs) which are Chinese limited companies can hire employees directly. Foreigners working in China will require the proper work visas and permits are obtained.

Term of Contract

There are several different types of terms that can be included in contracts. Contracts may be set for a fixed term or an open-term agreement. An employee who has worked for a company for over 10 years is entitled to an open-term contract.

Probation

A probation period can be included in a contract if the employee works full-time, and also has a contract term lasting over three months. This set period can only be included once however, and wages during any probation period may not fall below of 80% of agreed wages.

The length of the probation period which is permitted depends on the length of the contract. If the contract lasts less than a year, then the maximum probation period which is permitted is one month. If the contract lasts between 1-3 years then probation may be set at two months maximum; however, if your contract lasts over 3 years or over, or is an open-term contract, the probation period will be 6 months maximum.

Termination of Labour Contract

The termination of an existing contract may occur at any time by negotiation and consensus between the company and employee, where the company is liable to pay a severance compensation based on the number of years of service of the employee.

If the employee decides to terminate the contract, the required time to give notice depends on the circumstances. If the employee is under probation, only three days' notice is required, but for most other circumstances there must be a 30-day notice given. However the only exception is that the employee can terminate his/her contract immediately if the company does not provide remuneration previously agreed upon, or unlawfully violates rules and regulations put in place to protect the employee. Employees may also terminate their contract immediately if he or she has a part-time contract.

In certain circumstances, the company may terminate the contract immediately without compensation to the employee. If the employee is on probation and fails to measure up to the standards given, then the employer may terminate. The employer also has the right to terminate if the employee commits a serious breach of policy, is guilty of dereliction of their duties, or holds another employment relationship that affects their duties; Outside of work, a contract may also be terminated if the employee is subject to a criminal proceeding. Part-time contracted employees may also be terminated immediately or as per their agreed contract.

If the employee is under special circumstances, then a company may terminate their contract with either a 30-day notice or payment in lieu of notice. For example, if the employee reaches the end of a medical treatment period for a non-work related injury, and is unable to take up the original work or maintain a new position, the company may terminate their contract appropriately. Similarly, if the employee is incapable of performing designated tasks after training or transferring, the employer may terminate them.

There are several circumstances where a company cannot terminate the contract. If the employee is on a statutory medical treatment period, or has lost capacity to work due to a work related injury, then the employer may not fire that employee; also, if a female employee is either pregnant or nursing (up to the child's first birthday) then the company cannot terminate the contract unless paying full compensation for the full period. If an employee has been working for a company for fifteen years and is within five years of retirement, then the employer has no legal standing to terminate the employment relationship

If there are serious business losses or management difficulties within a company, the situation could result in a mass layoff of employees. In the event of a mass layoff (10% or twenty employees, whichever is fewer), a company must give 30-days' notice to its employees and/or the labour union (where a labour union exists). Five conditions will determine which employees will be retained by priority.

- Firstly, the employee who has the longest tenure with the company.
- Secondly employees who have fixed-term contracts, and thirdly employees with non-fixed term contracts.
- The fourth and fifth factors are not directly work related; employees who are the sole breadwinners in their families, and employees who care for elders and/or minors.

If an employee meets none of these conditions or holds a lower position on the hierarchy, he or she is most in danger of losing their job in the event of a mass layoff.

If an employer unlawfully terminates a contract, then they must reinstate that employee if the employee requests it. If the employee does not request to reinstate or it is "not possible" for them to reinstate, then the employee will be paid additional compensation at 100%.

In the original labour contract, a non-compete obligation may have been imposed on the employee on termination or expiration of the contract. This circumstance applies only to senior management, technical staff or other personnel with confidentiality obligations who plan to work for a competitor producing similar products or providing similar services to the company. The non-compete obligation has a maximum of a two-year period and the employee is liable if the obligation is breached, but the company must pay them during this period.



Termination Process

There are four steps in the process of terminating someone from their position. The first is to collect evidence that can be used to further support the claim for justifiable termination of the contract. After the evidence has been collected, company should meet with the employee to present your findings. After discussion, an negotiation process should take place to determine what the status of the employee's position in the company should be, after the conversation has ended if necessary. However the process is only over once a termination agreement has been signed by both the employer and the employee.

If the company are conducting a mass termination under redundancy (greater than twenty people or 10% of your labour force) then they must pre-file their decision with the labour bureau, or at least inform them that they are declaring redundancies. According to the law, a report from the company labour union (if one exists in the company) on the redundancy is required when the company files the redundancy with the Labour Bureau. Both the Chairman's signature and the company labour union chop are required on the report; afterwards, an all-staff meeting should be held to make the announcement of such. Several rounds of face-to-face meetings will then be conducted with the employees, including discussion and negotiation about keeping of some positions. Following this, termination agreements will be signed and the labour bureau will be notified of the decisions.

Companies may conduct redundancy termination in several batches in order to normalize the process. It is also sometimes good practice not to begin the termination process near a sensitive period such as a national holiday, or significant personal holiday to the employees. Staff negotiation should be held individually as opposed to collectively to allow more freedom of expression and reduce conformity. Plus it is advisable to handle easy cases first in order to reduce possible labour tribunal issues.

Compensation

All employees can entitled to compensation for overtime pay depending upon their role and seniority in the company. If employees are on a regular weekday schedule and work overtime, then each hour of overtime will be compensated at 1.5x that of the employee's base pay. If the company employees work on a weekend or set day of rest, overtime will increase to 2x base pay, and if on a public holiday, overtime must be 3x base pay.

Calculating the proper severance compensation is based upon the number of years the employee had worked for the company, one-month salary for each year of service with maximum payment of twelve months. This figure is based on the City Average Salary and should be capped at 300% of that average. For example, Shanghai has a higher average salary then Sichuan, so the severance compensation cap would be higher in Shanghai than if in Sichuan. Payment should be made within fifteen days of the employee's termination, otherwise, an additional 50-100% of additional compensation could be claimed depending upon the circumstances.

For every year of work, a month of salary will be paid as for compensation. If the employee has worked between half a year and a full year, then that time will count as a month's salary in compensation; however, if the time is below half a year, then the employee will receive half a month's salary as compensation. It should also be noted that the salary includes all forms of income, including annual bonus, travel and meal allowance, etc.

As stated earlier in the article, a woman may not be considered redundant, nor can be terminated, if pregnant or nursing an infant up to the infant's first birthday. Severance for maternal leave shall be paid all Twelve months after pregnancy is over. The only issue to be resolved is reimbursement from a social insurance centre, which would be considered with a supplementary agreement.

If employees are being compensated in one lump sum, then individual income tax does apply if the sum is over three times the local average wages. Non-compete and severance bonus should be split from compensation to reduce overall tax.

Conclusion

Overall labour laws are quite comprehensive in China and not that different from those in many developed countries. Workers in China, both native and foreign, have rights granted to them by Chinese Labour Law. It is far cheaper in the long run to avoid China employment law problems than to have to deal with one that has arisen. We suggest that you contact LehmanBrown if you have any questions.

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