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China

EMPLOYMENT AND LABOUR LAW

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in China.

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1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Yes. Termination at will is not supported under PRC laws and employers need a reason for unilateral termination. The most frequently used reasons are gross misconduct and incompetence. These reasons however all set out strict requirements for employers to follow.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

Under Article 41 of the Employment Contract Law (economic layoff), if an employer needs to do a redundancy involving 20 employees or 10% of all the employees, among other conditions, it can do so following reporting the situation to the relevant local authority.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

If the sale involves only shares, then under PRC laws this is considered a change of investors and thus should not impact employees' employment in any way. If the sale however involves sale of assets, then under PRC laws this may be considered having constituted a major change in the objective circumstances which may entitle an employer to terminate the employees relevant to the asset under certain other conditions.

4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

For termination under Article 39 of the Employment Contract Law (e.g. gross misconduct), a prior notice is not required and termination can have immediate effect. For termination under Article 40 of the Employment Contract Law (e.g. incompetence), a 30-day prior notice or payment in lieu of notice is required. Under PRC laws these notice requirements apply equally to every employee, barring part-time employees who can be terminated anytime without a reason. Contractual clauses offering employees a longer notice period for termination are rarely seen in practice.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Unilateral termination requires a statutory reason and without it the termination will be considered unlawful. Payment of monies such as statutory severance does not guarantee the lawfulness of a termination decision. To mitigate the risks for unilateral termination however employers most of the time will first resort to mutual termination in which statutory severance and additional severance are offered to employees. If mutual termination is reached, then an employer does not need to unilaterally terminate an employment contract and as such no notice is required.

6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

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Yes. Although the law is silent on this issue, this can usually be supported in practice.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

Regardless of the reasons for unilateral termination, a written termination notice is required. For termination under Article 39 of the Employment Contract Law (e.g. gross misconduct), a prior notice is not required and the termination notice can have immediate effect. For termination under Article 40 of the Employment Contract Law (e.g. incompetence), a 30-day prior notice or payment in lieu of notice is required.

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

The termination is likely to be considered unlawful. An employee as such can request either reinstatement with back pay or double severance payment. In practice, most employees may opt for reinstatement with back pay, in that this compared with double severance payment is often more beneficial.

9. How, if at all, are collective agreements relevant to the termination of employment?

There are no material connections between collective agreements and the termination of employment in practice.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

Under PRC laws, an employer needs to notify its union (if there is a union) a unilateral termination decision. For economic layoff under Article 41 of the Employment Contract Law, for redundancies, an employer also needs to report the situation to the relevant local authority (i.e. the relevant local labour authority in charge of this matter). Absent these requirements, the termination decision is likely to be considered unlawful. An employee as such can request either reinstatement with back pay or double severance payment.

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Termination of employment based on discrimination or harassment is banned under PRC laws. The law is basically silent on detailed protective measures.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

If an employee is able to prove that a termination decision was actually based on discrimination or harassment instead of the reason used for termination, then the termination decision is likely to be considered unlawful. An employee as such can request either reinstatement with back pay or double severance payment.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

No. PRC laws treat all employees equally on this point.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

No. The law is silent on this issue. Note however that if an employee is able to prove that a termination decision was actually based on whistleblowing instead of the reason used for termination, then the termination decision is likely to be considered unlawful.

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15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

The short answer is no. There is no such mechanism under PRC laws. Although employers can try to achieve the same result by splitting the action through terminating employment first and offering re-engagement as a separate move, the described mechanism as a whole is absent under PRC laws. In practice, most employers will also not choose to terminate employment and then reengage the already terminated employees, in that not only does this not materially cut cost, the immediate re-engagement also makes the previous termination pointless – the employees stay and the termination of their employment in the future can still be a headache. In the described situation, what most employers would be doing is try to offer the relevant employees reduction of salary, and for employees that do not accept reduced salary, employers can then consider termination based on financial difficulties. Following termination of employment, if employers find out that more employees are required thanks to increased production, the employers can employ new employees on the market.

16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

There are no such laws or cases yet. As mentioned above however, if an employee is able to prove that the termination decision was actually based on the use of AI instead of the reason used for termination, then the termination decision is likely to be considered unlawful.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

For termination under Article 39 of the Employment Contract Law (e.g. gross misconduct), no severance is required. For termination under Article 40 (e.g. incompetence) and Article 41 (economic layoff), statutory severance should be paid to employees. The equation for calculating statutory severance is basically one month of salary for one year of employment. The monthly salary used should be the average monthly salary in the 12 months prior to termination, and if the figure exceeds three times the local average monthly salary, three times the local average monthly salary should be used as the monthly salary in calculation. Note that for termination under Article 40, a 30-day prior notice is required or payment in lieu of notice can be paid instead.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Yes. This is permitted under PRC laws. An employer and an employee can enter into a mutual termination agreement recording their intention for termination of employment, and the employer, aiming to obtain the employee's consent to termination, should pay the employee statutory severance and can choose to pay additional severance. A mutual termination agreement is required to document it. The employer and the employee can agree on limitations that apply following termination of employment, for instance, non-disclosure, confidentiality and non-compete.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Non-compete clauses and agreements are often seen in practice and are enforceable under PRC laws. For the longest period of two years following termination of employment, an employer can require an employee to fulfil non-compete obligations and as such the employer needs to pay non-compete compensation to the employee and if the employee violates the obligations liquidated damages can be supported.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of

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employment?

Yes. Condidentiality obligations can be agreed for an unlimited period of time after termination of employment. To better protect the confidential information and enforce the relevant liabilities clauses, as mentioned above, an employer can sign a non-compete agreement with an employee.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

There are no such obligations for an employer under PRC laws.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The protection against dismissal offered to employees has always been strong under PRC laws, and it is safe to say that unilateral termination of employees always comes at a risk that the termination may be considered unfair due to the high standard set out by PRC laws. Once a termination decision is ruled as unfair, employees under PRC laws can request either reinstatement with back pay or double severance payment. Compared with double severance payment, reinstatement with back pay is often more expensive for employers, and in practice every employer in arbitration and litigation would try to avoid this outcome if possible by proving that continuing employment is not a viable option.

Aside from the statutory grounds for not being able to continue employment with an employee (e.g. expiration of employment contract), an argument that is often used by employers in practice is that the trust between an employer and an employee is already destroyed by the employee's aggressive and/or dishonest actions (e.g. using aggressive language against others, false reimbursements), and it is not possible for the employer and the employee to continue their employment relationship. Reinstatement with back pay should hence not be supported. In the past, it would be very difficult for an employer to establish the argument outside the statutory grounds. At present, however, some cases in practice have witnessed the loosened attitude of some arbitrators and judges willing to support only double severance payment instead of reinstatement with back pay for an employee based on the trust argument and certain supporting evidence.

Although it is not guaranteed whether the current cases in practice can bring a breakthrough to the very rigid system offering strong protection to employees, this is, however, certainly a development that should be noted by employers as well as closely watched.

23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The Supreme Court recently published the Second Judicial Interpretation for the Application of Law in Employment Dispute Trials ("Second Interpretation"). Although the Second Interpretation is still at the stage of soliciting public opinions, its impact in the future is not to be neglected. It has brought forward several important changes which once take place will reshape the current understanding of some fundamental issues.

For example, in the current practice, there have always been debates as to whether disputes relating to stock options/RSUs should be considered employment-related disputes and hence be tried by employment arbitration commissions and categorised as employment disputes at the court stage. The difference is that, if these disputes are taken as employment-related disputes and the employment law rules apply, the protection offered to employees will be much stronger than that under the typical civil disputes where there is no concept of employees and only the concept of equal parties. For instance, if a termination decision is considered unlawful, then it may greatly impact the decision on stock options/RSUs if they are also part of the employment dispute in question – arbitrators and judges may rule in favour of an employee since the termination is unlawful. Arbitration commissions and courts in China have long adopted different approaches to categorising these disputes and some of the decisions made were even different for arbitration commissions and courts in the same city. The Second Interpretation however sets out clearly that if the stock incentive in question was granted to an employee due to the existence of employment relationship, then the relevant disputes should be considered employment-related and handled accordingly. This is a giant leap from the current position and could indicate that the protection offered to employees involved in stock incentive disputes will become stronger in the future.

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Another highlight is the potential change to the everlasting rule of two consecutive fixed-term employment contracts leading to the obligation of entering into an open-ended employment contract for an employer. This, different to the above, may however be a rarely seen move giving more freedom of management to employers. According to the current rule, once an employer signs a consecutive second fixed-term employment contract with an employee, the employer by the expiration of the second employment contract does not have the right to ending the contract, and on the contrary the employee is entitled to sign an open-ended employment contract with the employer. This rule dictates that if an employer wishes to not renew an employment contract, it can only do so when this employment contract is the first one with an employee. It has long confused and impacted the decision-making of employers and is often consider onerous for employers. A ray of hope this time has managed to emerge in the Second Interpretation, and it appears trying to balance the competing interests and expectations by empowering employers when it comes to renewing employment contracts. The Second Interpretation says that if an employment contract is renewed by longer than one year, it should be considered that the employee and the employer have entered into two consecutive employment contracts. This message, if read in the reverse order, can be understood as that, as long as the renewed contract is shorter than one year, an employer is not obligated to sign an open-ended employment contract and is still entitled to end the contract upon expiration. As such, when unilateral termination of employment comes with great risks, an employer can still have the choice of letting an employee roll off at the end of the contract instead of doing unilateral termination in advance. It remains to be seen how this rule plays out in practice, but regardless of the outcome this new development sends out a groundbreaking message that employers' needs in management are heard and being taken care of.

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