# China

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# China: Employment and Labour Law

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

Yes, the PRC employment laws set strict limitations on employment relationship terminations and there is no such concept of "termination at will" for full-time employees. Apart from mutual termination and unilateral termination by an employee, the statutory unilateral termination grounds by the employer can be divided into fault termination, non-fault termination and economic layoffs:

**Fault Termination**

An employer is entitled to unilaterally terminate the employment contract without prior notice:

1. where an employee is proven to have failed to satisfy the recruitment requirements during the probation period;
2. where an employee has seriously violated the internal policies of the employer;
3. where an employee has committed serious dereliction of duty or practices graft, causing material damage to the employer;
4. where an employee has established an employment relationship with another employer concurrently, which materially affects the completion of his/her tasks with the current employer, or the employee refuses to rectify the matter as demanded by the employer;
5. where an employment contract is rendered wholly or partially void when the employee causes the employer to conclude or amend the employment contract against the employer's true intention by means of fraud, coercion or taking advantage of the employer's disadvantaged position; or
6. where an employee is prosecuted for criminal liability according to law.

**Non-fault Termination**

An employer is entitled to unilaterally terminate the employment contract with 30 days' prior written notice or one month's salary in lieu:

1. where an employee suffers from an illness or a non-work-related injury and is unable to undertake the original job or other job arranged for them by the employer following completion of the stipulated medical treatment period;
2. where the employee is proved incompetent in their job and remains incompetent after receiving training or a position amendment by the employer; or
3. where the objective circumstances on which the conclusion of the employment contract was based have undergone major changes and, as a result, the employment contract can no longer be performed ('**a major change in the objective circumstances**'), and upon negotiation between the employer and the employee, both parties are unable to reach an agreement on the change of the employment contract.

**Economic Layoffs**

Economic layoffs may apply if large numbers of redundancies are planned when certain statutory requirements are met. Please refer to our response under Question 2 for specific requirements for economic layoffs.

Apart from the above termination grounds, an employment contract will be ended when any of the following occurs and the employer notify the employee on employment contract ending ("**End of Employment Contract**"):

1. the term of the employment contract expires;
2. the employee starts to take his/her pension entitlement or the employee reaches legal retirement age;
3. the employee is dead or declared dead or missing by the People's Court of the PRC;
4. the employer is declared bankrupt;
5. the employer has its business licence revoked, is ordered to close down or decides on early dissolution; or
6. any other situation stipulated by applicable PRC laws.

For part-time employees (who is paid on an hourly basis and works for not more than 4 hours per day on average as well as not more than 24 hours per week), their employment contract can be terminated at any time, free from the constraint of the above statutory reasons.

 

## 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?

If an employer is reducing its workforce by 20 persons or more, or by 10% or more of the total number of its employees, the termination ground of economic layoff can be invoked under any of the following circumstances ("**Statutory Economic Layoff Situation**"):

1. restructuring pursuant to the PRC Enterprise Bankruptcy Law;
2. serious difficulties in production and/or business operations;
3. the employer switches production, introduces a major technological innovation or revises its business method, and, after the amendment of employment contracts, still needs to reduce its workforce; or
4. other major changes in the objective economic circumstances relied upon at the time of execution of the employment contracts, rendering them unable to be performed.

Before carrying out the layoffs, the employer is obliged to take below steps as procedural measures to protect the employees' rights:

1. to explain the circumstances to its trade union or all of its employees 30 days in advance;
2. to consider the opinions of the trade union or the employees; and subsequently
3. to report the layoff plan to the competent labour authorities.

In addition, employers shall notice that the following employees shall be given priority to be retained during the layoffs:

1. if he/she has entered into a fixed-term labour contract of a longer period with the employer;
2. if he/she has entered into a non-fixed-term labour contract with the employer; or
3. if his/her family members are not employed, and there is the aged to be supported or the under-aged to be raised in his/her family members.

Where an employer is re-hiring employees within six months after the layoff, the employer shall notify the laid-off personnel and they shall be given priority for recruitment under the same conditions.

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

Generally speaking, neither asset sales nor share sales will directly lead to a statutory termination ground, and the employer shall still invoke the statutory grounds for employment termination.

For share sales, the employment relationship between the seller and its employees remains unchanged unless otherwise agreed by the seller, the buyer and the individual employee. For asset sales, it may constitute a major change in the objective circumstances (one of the statutory termination grounds) which enable the employer to terminate the employment contract, however note that the criteria may be high in certain districts, e.g., in Beijing the asset sales shall be caused by changes in laws, regulations or policies, meanwhile other applicable statutory requirements for termination shall be met.

## 4. Do employees need to have a minimum period of service in order to benefit from termination rights? If so, what is the length of the service requirement?

No. In general, the employee has the right to terminate the employment contract with a 30-day (3-day for employees during probation period) prior notice in writing regardless of his/her period of service. Nevertheless, the amount of severance (if any, e.g., when the employee unilaterally terminates the employment contract for employer's failure to pay salary in full and in time) may differ based on the length of period of service (Please refer to our response under Question 18 for specific calculation for severance).

## 5. 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 the termination grounds mentioned in our response under Question 1, prior notice is not required for Fault Termination. For Non-fault Termination, an employee must be given a 30-day prior written notice or one month's salary in lieu of notice. In terms of Economic Layoffs, employers shall explain the situation to the trade union or all of its employees 30 days in advance (which can be regarded as a form of prior notice) and seek their opinions before reporting the proposed layoffs to local

 

administrative authorities. Additionally, though not required by the PRC Employment Contract Law, some local regulations in cities such as Beijing require the employer to give prior notice (or salary in lieu of notice) to employees when the term of an employment contract expires and the employer decides not to renew it. Part-time employee, however, are not entitled to the notice period.

An employee shall also give prior notice (30-day after probation period and 3-day for employees during probation period)) to the employer upon resignation.

Employers and employees can reach an agreement on the minimum notice period beyond the statutory requirements, however, such agreements are not commonly seen in practice.

## 6. Is it possible to make a payment to a worker to end the employment relationship instead of giving notice?

Where there are statutory employment termination/ending grounds and where prior notice is required (basically Non-fault Termination and Ending of employment contract upon expiration where local regulations requires prior notice), the employer may choose to pay salary in lieu of notice.

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

As long as there is no pay cut during the garden leave period, it is generally fine for employers to arrange employees on garden leave, despite the PRC employment laws remain silent on this issue.

## 8. 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.

Despite of other specified procedural requirements for each termination grounds (e.g., prior notice where applicable, report the layoff plan to the competent labour authorities for Economic Layoff), the employer is obliged to follow the procedures below:

1. notifying the trade union of the reason for termination beforehand, consider the trade union's opinion (if any) and notify the trade union of its handling outcome in writing (*for grounds of unilateral termination by the employer*);
2. delivering the termination notice to the employee (*for grounds of unilateral termination by the employer*);
3. making the severance payment if needed;
4. registering the termination with the labour authorities if so required by local regulations, and assisting with the social insurance and housing fund transfer for the employee; and
5. issuing an employment termination certificate to the employee.

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

Except for procedural requirements (4) and (5) as listed in our response under Question 8, failing to meet other procedural requirements for termination may independently lead to unlawful termination. The employee concerned may request for either reinstatement of employment with back pay or a double severance payment.

The employer may also be ruled by an arbitration committee or court to issue a proper employment termination certificate or assist the employee with transferring the social insurance and housing fund if it does not comply with such requirements.

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

Collective agreements are usually concluded for matters relating to remuneration, working hours, rest and vacations, occupational safety and health, insurance and welfare, etc., but have rather insignificant relation with termination of employment.

## 11. 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?

Generally, no official permission is required before termination, except for Economic Layoff where the employer shall report the layoff plan to the competent labour authorities in advance. In some areas, local labour

 

authorities tend to substantively review the layoff plan, and thus may be regarded as a quasi-permission.

In addition, as is explained in our response under Question 8 and 9, the employer is obliged to notify the trade union of the reason for unilateral termination beforehand, otherwise the procedural defects may lead to unlawful termination, although the trade union's right of being notified and bringing out opinions are not exactly the same as granting a permission, but more of a participation right.

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

Although PRC employment law does not expressly set standards to examine potential discrimination or harassment in the context of termination or set detailed protective measures, discrimination and harassment are prohibited under PRC employment law. The PRC Labour Law generally provides that people should not be treated unfairly due to race, gender, religion, etc, and women should have equal rights of employment as men. Additionally, the PRC Employment Promotion Law provides that employees are entitled to equal employment, and individuals seeking employment shall not be discriminated against because of ethnicity, race, gender, religious belief, disability, and whether the individuals are from rural places. The PRC Law on the Protection of Rights and Interests of Women further ensures equal employment rights for female employees and prohibits discrimination against female employees, and it is clearly stipulated that employer shall not dismiss female employees due to marriage, pregnancy, maternity leave and breast-feeding, etc.

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

The termination is likely to be held unlawful if it is evidenced that there lacks statutory termination grounds and the termination decision is based on discrimination or harassment. As a consequence to unlawful termination, the employee may request for either reinstatement of employment with back pay or a double severance payment.

## 14. 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?

Yes. Under PRC employment laws, employers are not allowed to dismiss an employee invoking Non-fault Termination grounds or Economic Layoffs if employees are under following categories ("**Protected Employee**"):

1. an employee who has been exposed to occupational disease hazards and has not received any occupational health check-up before leaving his/her post, or who is suspected of having contracted an occupational disease and is being diagnosed or is under a medical observation period;
2. an employee who has been confirmed as having lost (or partially lost) his/her capacity to work as a result of contracting an occupational disease or sustaining a work-related injury at his/her current employer;
3. an employee who has contracted an illness or sustained a non-work-related injury and his/her medical treatment period has not expired;
4. a female employee during a pregnancy, maternity or nursing period; or
5. an employee who has been working for 15 years consecutively for the current employer and will reach statutory retirement age in less than five years' time.

In addition, the employment contract of a Protected Employee shall not be ended upon expiration of their employment contract. Instead, their employment contract must be extended until the relevant circumstance ceases to exist.

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

The short answer is no. Under the current PRC laws, there are only some general legal provisions to encourage companies' establishment of internal whistleblower policies and general protections for whistleblowers such as keep the information of whistleblowers confidential, protecting whistleblowers from retaliation, etc. As such, whistleblowers are not provided with special protection from termination of employment while the termination is likely to be held unlawful if it is evidenced that there lacks statutory termination grounds and the termination decision is based merely on retaliation.

 

## 16. 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?

There is no mechanism of termination followed with re-engagement on new, less favourable terms in the event of financial difficulties under PRC employment law. The most relevant termination ground for financial difficulties is Economic Layoff. If the financial difficulties situations meet one of the statutory Economic Layoff situations listed in our response under Question 2 above, and the other statutory requirements for Economic Layoff are met, the employer may invoke Economic Layoff to lawfully terminate an employee's employment.

That is to say, in the event of financial difficulties, the employer may proceed with unilateral termination invoking Economic Layoff provided that statutory requirements are met, however, offering re-engagement on new, less favourable terms itself does not establish a statutory termination ground even with financial difficulties situations.

Although the employer can offer re-engagement on new, less favourable terms to the dismissed employee after unilateral termination and if the employee agrees, he/she can re-join the employer. However, it is not common in practice and from cost-saving perspective, it is also better for the employer to not offer re-engagement even with less favourable terms.

## 17. 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?

The current PRC employment laws do not prohibit employer from using artificial intelligence in an employer's recruitment or termination decisions. And there are currently few labour disputes cases concerning using artificial intelligence in an employer's recruitment or termination decision. Generally, we understand that the termination is likely to be held unlawful if it can be clearly proved with solid evidence that there lacks statutory termination grounds and the termination decision is merely made by using of AI or automated decision-making. However, it is difficult for employees to challenge termination solely on the basis that decisions were made by using of AI or automated decision-making.

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

Under PRC employment laws, an employer is required to pay statutory severance for the following employment contract termination/ending grounds:

1. Mutual termination proposed by the employer;
2. Non-fault Termination by the employer;
3. Economic Layoff;
4. The expiration of the employment contract, unless the employer maintains or improves the terms and conditions of the employment contract and the employee refuses to renew the contract;
5. Unilateral termination by the employee under any of the following circumstances:
    - where the employer fails to provide labour protection or labour conditions pursuant to the provisions of the labour contract;
    - where the employer fails to promptly pay labour remuneration in full amount;
    - where the employer fails to contribute social security premiums for the worker pursuant to the law;
    - where the rules and system of the employer violate the provisions of laws and regulations and are prejudicial to the worker's rights and interests;
    - where the labour contract is rendered void under any of the circumstances stipulated in the first paragraph of Article 26 of the PRC Employment Contract Law; or
    - any other circumstances where the worker may rescind a labour contract as stipulated by the laws and regulations.
6. End of employment contract when the employer is declared bankrupt or when the employer has its business licence revoked, is ordered to close down or decides on early dissolution.

In general, statutory severance (commonly referred to as "**N**") is calculated as the employee's average monthly salary of twelve months before the termination multiplied by the employee's service years:

- For the average monthly salary, any monetary remunerations including base salary, bonus, allowance shall be included.
- For service years, any periods less than 6 months shall be counted as 0.5 year and any period of not less than 6 months but less than 1 year shall be counted as 1 year.

 

In addition, there are two caps when calculating the amount of statutory severance. If the employee's average salary in the 12 months prior to termination is higher than three times the local average monthly salary of employees declared annually by the government at where the employer is located ("**Cap Figure**"), the average monthly salary of the employee shall be capped at Cap Figure and the service years shall be capped at 12 years when calculating the statutory severance.

Since the Employment Contract Law took effect on 1 January 2008, for employees with service year before 2008, their statutory severance pay shall be calculated in two parts and there may be slightly different rules in different regions.

## 19. 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.

The employer can reach mutual termination agreement with the employee on terminating employment contract and there can be clauses regarding waiver of rights and separation payments. However, strictly speaking, the separation payment is not exactly provided in return for employee's waiver of his/her rights.

As stated in our response under Question 18, statutory severance is legally required for mutual termination regardless of whether the employee validly waives his rights. The employer sometimes provides additional severance on top of the statutory ones. Although the waiver of rights clauses (e.g., waives rights against the employer arising from the employment relationship) is commonly seen for mutual termination cases, the additional severance part is provided as a whole to encourage the employee on agreeing with mutual termination, rather than merely as a consideration for employee's waiving his/her rights.

To summarize, employers can reach agreement with employees regarding mutual termination as long as the contents does not violate the mandatory provisions of laws and administrative regulations and does not involve any fraud, coercion or taking advantage of the employee's difficulties, major misunderstanding or obvious unfair circumstances. And, it is suggested that the employer enter into a mutual termination agreement with the employee, stipulating the termination date, separation payment, waiver of rights, non-disclosure, confidentiality and any other terms and conditions.

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

Yes, under PRC employment laws, an employer is allowed to agree with an employee on non-compete obligations to prevent an employee from working for competitors after the termination of employment for a certain period. The non-compete clauses can be stipulated in an employee's employment contract or through a separate agreement. Key stipulations on non-compete include the followings:

- Restricted competitive behaviours: work for a competing company that produces the same type of products, engage in the same type of business as their former employer, establish their own business to produce the same type of products, or engage in the same type of business, or compete with their former employer in any other way.
- Scope of the employees: employees can be imposed on non-compete obligations is limited to senior management, senior technicians or other employees under confidentiality obligations.
- Scope of regions: the geographical region of the non-compete should be generally limited to the fair and reasonable scope of region where an actual competitive relationship may be established (factors to consider include business coverage and industry characteristics).
- Non-compete period: the period of non-compete period shall not exceed two years after termination.
- Non-compete compensation: to require the employee to perform the non-compete obligations, the employer has to pay non-compete compensation to the employee on a monthly basis throughout the non-compete period. The specific amount/standard of the non-compete compensation can be negotiated and agreed on by the employer and the employee. According to relevant regulations on the national level, if there is no such agreement on the specific amount, the default amount is 30% of the employee's average monthly salary over the previous 12 months before the termination or expiration of the employment contract for each month (local rules may have different rules on this point).
- Liabilities for breach: under PRC employment laws, if an employee breaches the non-compete obligations, the employer can claim for the liabilities for breach of contract as agreed by the parties, including liquidated

 

damages and/or recovery of the non-compete compensation paid by the employer. Meanwhile, the employer can require the employee to continue performing the non-compete obligations for the rest of the non-compete period (if any).

## 21. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes, an employer can formulate internal policies, or agree with employees in the employment contract or a separate confidentiality agreement on relevant matters of confidentiality, including the protection of the employer's trade secret and other confidential information, including after the termination of the employment. At present, there are no nationwide regulations requiring the payment of compensation for adhering to the confidentiality obligation. Therefore, in practice, employers need not pay their employees in exchange for their complying with the confidentiality requirements. If an employee violates the confidentiality requirements and causes economic losses to the employer, the employer can claim compensation against the employee based on the internal policy, relevant stipulations in the employment contract or the confidentiality agreement.

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

No. Employers can decide on their own whether to provide references to the new employers and what information to provide if these are requested. If the employer decides to provide references to new employers, the employer shall pay attention to personal information protection in providing relevant information.

## 23. 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?

PRC employment laws are more protective to employees and thus set relatively high standards of obligations for employers, especially with respect to termination. When it comes to employment contract termination, it is commonly seen that employers cannot meet all legal requirements for the invoked termination grounds. Consequently, it is crucial for employers to evaluate which termination/ending ground can be invoked, and to meet the legal requirements for the specific termination/ending grounds, and shall take the different judicial practice requirements in different regions into considerations.

For instance, Article 40 (3) of the *PRC Employment Contract Law* stipulates the statutory termination ground of "major change to the objective circumstances", i.e., an employer is entitled to unilaterally terminate the employment contract with a 30-day prior written notice or one month's salary in lieu, and with statutory severance pay where the objective circumstances for which the conclusion of the employment contract is based have undergone major changes and, as a result, the employment contract can no longer be performed, and upon negotiation between the employer and the employee, both parties are unable to reach an agreement on the change of the employment contract.

In practice, many employers interpret this termination grounds in a way that, where there is structural reorganization that leads to positions eliminations, the employer can thus invoke this termination ground to dismiss employees at the eliminated positions. However, it is common to see legal risks associated with taking this approach:

- For one thing, local rules may have more detailed standards on determine what constitutes "major change to the objective circumstances", e.g., in Beijing, in addition to extreme situations such as force majeure events (such as earthquakes, fires, and floods) and business scope change for employers with the nature of franchise, major changes such as asset transfer only constitute "major change to the objective circumstances" if it is caused by amendments in laws, regulations, or policies. In this light, courts in Beijing tends to rule that organization changes initiated by employers does not constitute "major change to the objective circumstances" and correspondingly termination invoking 40(3) is held unlawful;
- For the other thing, even if there is a "major change to the objective circumstances", the employer shall also meet other legal requirements including negotiating with the employee on employment contract amendment and unable to reach an agreement. There will also be difficulties for employers including whether the employment contract amendment offer is reasonable.

To mitigate legal risks associated with termination, it is advisable for employers to learn local rules and judicial practice so as to better assess which termination/ending

 

ground can be invoked, and whether legal requirements for specific statutory ground can be met. Another point to note is that, where labour dispute cases arise, evidence on hand plays an important role. For example, for termination based on gross misconduct of employees, whether there is sufficient evidence to prove the gross misconduct behaviours is crucial to the validity of termination. Therefore, it is suggested that the employer keep a good record of the termination process, including evidence to prove the employees' misconduct (recording, interview notes, etc.). And, if the unilateral termination is assessed to be associated with relatively high risks, the employer may consider negotiating with the employee on mutual termination first, to avoid legal consequences of unlawful termination, especially if the employee claims for reinstatement.

### 24. 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?

We haven't seen key changes in relevant laws, regulations or policies in the employment law area coming out in the past year, which had direct impact on or are likely to impact employment contract termination. However, judicial practice views in different areas change constantly. Employers are advised to keep an eye on changes in laws and regulations at both national and local levels as well as developments in local judicial practice to better assess legal risks associated with termination.

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